Supreme Court, U.S.
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No. 95-1607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID L. WILLIS,
Petitioner,

vs.

DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA
COLONEL SID MILES, Commissioner, MAJOR R.C. COLEMAN,
Commanding Officer, CAPTAIN DENNIS SUTTON, Adjutant,
Respondents.

On Petition For Writ Of Certiorari
To The Georgia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case involves a Georgia State Patrol officer who became a state employee in 1969. As such, he became a member of the Georgia Employee Retirement System and became subject to the applicable statutes and rules as they existed on that date. In 1984, Georgia amended its constitution to allow the legislature to change any public retirement or pension system in existence prior to January 1, 1985 for the purposes set out in the amendment. The amendment also specifically stated that persons who were members of a public retirement or pension system before January 1, 1985 would be subject to any law enacted under the constitutional amendment. The petitioner was discharged in 1994 under the terms of the statute enacted under this constitutional amendment. The effect of this discharge was to strip the petitioner of his rights which had vested under the Georgia Employee Retirement system.

The questions presented for review therefore are:

1. Is Article 3, Section 10, Paragraph VI of the Georgia Constitution, adopted in 1984, contrary to the impairment of contract clause of Article I, Section X of the United States Constitution as applied to persons hired by the state before that date?

2. Are the provisions of OCGA § 47-2-2 which were enacted after the petitioner's rights under the Georgia Retirement System became vested unconstitutional as applied to the petitioner?

PARTIES TO THE PROCEEDINGS

The names of all parties to this action appear on the cover of the petition.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings	ii
Table of Cited Authorities	iv
Citation to Case Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Summary of Argument	4
Argument and Citation of Authorities	7
Conclusion	10
Appendix	A-1, *et seq.*

TABLE OF CITED AUTHORITIES

Page(s)

Cases:

Bender v. Anglin, 207 Ga. 108, 60 SE2d 756 (1950) 7

Coombes v. Getz, 285 US 434,, 76 LEd 866, 52 S Ct 435 (1932) 8

Department of Public Safety v. Willis, 218 Ga. App. 541, 462 SE2d 386 (1995)..... 1

Fiske v. Jefferson Police Jury, 116 US 131, 29 LEd 587, 6 S Ct 329 (1885) 8

Home Building & Loan Assn. v. Blaisdell, 290 US 398, 78 LEd 413, 54 S Ct 231, 88 ALR 1481 (1934) 7

Indiana ex rel. Anderson v. Brand, 303 US 95, 82 LEd 685, 58 S Ct 443, 113 ALR 1482 (1938) 7

1983 Op. Att'y Gen. No. U83-72 8

1995 Op. Att'y Gen. No. U85-3 8

Thomas v. Collins, 323 UA 515, 89 LEd 430, 65 S Ct 315 (1945) 9

United States Trust Co. v. New Jersey, 431 US 1, 52 LEd 92, 97 S Ct 1505 (1977) 7

Withers v. Register, 246 Ga. 158, 269 SE2d 431 (1980) 7

Statutes and Rules:

United States Constitution, Article I, Section X i,4,7,10

Georgia Constitution, Article 3, Section 10, Paragraph VI i,3,8,10

28 USC § 2104 2

28 USC § 2401 (c) 2

28 USC § 2403 2

U.S. Supreme Court Rule 13 2

U.S. Supreme Court Rule 29.4 (c) 2

OCGA § 47-2-1 (20) and (21) 2,3,7

OCGA § 47-2-2 .....i,4,5,7,8,10

OCGA § 47-2-2 (c)(7) 3

OCGA § 47-2-2 (d) 3,4

OCGA § 47-2-3 2,8,9

OCGA § 47-2-3 (f)(1) 4,8

OCGA § 47-2-123 4

1984 Ga. Laws 1296 7

No.

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DAVID L. WILLIS,
Petitioner,

VS.

DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA
COLONEL SID MILES, Commissioner, MAJOR R.C. COLEMAN,
Commanding Officer, CAPTAIN DENNIS SUTTON, Adjutant,
Respondents.

On Petition For Writ Of Certiorari
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CITATION TO CASE BELOW

Department of Public Safety vs. Willis, 218 Ga. App. 541, 462 SE2d 386 (1995)

STATEMENT OF JURISDICTION

The petitioner seeks review of a decision of the Georgia Court of Appeals entered on August 17, 1995. The petitioner filed a Motion For Reconsideration, which the court denied on September 19, 1995. Petitioner then applied for Writ of Certiorari to the Georgia Supreme Court on October 10, 1995. That petition was

denied on January 5, 1996. Petitioner then filed his Motion For Reconsideration, which that court denied on January 26, 1996. The Petition is therefore brought within ninety days of the denial of rehearing by the Supreme Court of Georgia, which is the state court of last resort in this instance. 28 USC § 2101 (c); Supreme Court Rules 13.1 and 13.3.

The Supreme Court of the United States has jurisdiction under the provisions of 28 USC § 2104.

An agency of the State of Georgia and three officers of that agency are parties to this action, and the Attorney General of Georgia is counsel of Record for the respondent. The provisions of 28 USC § 2403 (b) and Rule 29.4 (c) do not apply.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The texts of the following provisions are set out in full in the attached appendix.

Constitution of the State of Georgia Article III, Section 10, Paragraph 6

OCGA § 47-2-1

OCGA § 47-2-2

OCGA § 47-2-3

STATEMENT OF THE CASE

David Willis was hired by the Georgia Department of Public Safety as a state trooper in 1969 and became a member of the Georgia Employee Retirement System.

When he was hired, the definitions of the terms "involuntary separation from employment without prejudice" and "Involuntary separation from employment with prejudice" were the definitions set by the General Assembly in 1968. These are

presently codified at OCGA § 47-2-1 (20) and (21). When Mr. Willis was hired, and thereby entered into his employment contract with the state, these two paragraphs defined the only terms under which an employee could be denied the right to collect a pension that had vested under the Retirement System. App 10.

In 1984, the General Assembly passed legislation intended to redefine involuntary separation from employment, and to add restrictions to an employee's right to qualify for retirement based on involuntary separation. Obviously aware that this new statute would violate the provisions of the Georgia Constitution as it then existed, the legislature made the effectiveness of the act contingent upon the ratification of a constitutional amendment at the 1984 general election. That amendment was passed and became the present Article III, Section X, Paragraph 6. The new legislation was codified at OCGA § 47-2-2, and added provisions to OCGA § 47-2-1.

In 1994, the Department of Public Safety began proceedings to terminate the petitioner's employment for "irresponsible performance of duties and neglect of duty" as defined in OCGA § 47-2-2. The grounds alleged were clearly based on the provisions of the 1984 statute. The petitioner first questioned the statute's constitutionality under the United States Constitution at the very beginning of the hearing before the administrative law judge. App. 8. The hearing officer found that the petitioner should be discharged for neglect of duty as defined by OCGA §47-2-2 (c) (7), and specifically noted that he would be subject to losing his retirement benefits under the provisions of OCGA § 47-2-2 (d). App. 8.

The petitioner appealed this ruling to the Superior Court of Gwinnett County. Judge Ernest H. Woods heard the case and found that the application of the 1984 statute to the petitioner would be unconstitutional under both the United States and

Georgia constitutions. Specifically addressing the 1984 constitutional amendment, Judge Woods wrote,

> Although the current version of OCGA § 47-2-2(d) is based on an act of the legislature which was ratified by a constitutional amendment at the 1984 general election, its application as to pre-1985 members would be unconstitutional as the courts have extended the impairment prohibition to any provisions of a state constitution that would likewise impair such contractual obligations. App. 2.

As the employer's decision specifically stated that the petitioner's discharge would subject his retirement benefits to the sanctions set out in OCGA §47-2-2 (d), the trial court ruled that OCGA § 47-2-2(d) was unconstitutional as applied to the petitioner, and that he was entitled to the involuntary separation retirement benefits provided under OCGA § 47-2-123(c). App. 2

The Department of Public Safety then appealed to the Georgia Court of Appeals. Even though the administrative law judge's decision specifically addressed the pension issue, and in spite of the plain language of the statute providing for judicial review in such matters[1], the Court of Appeals ruled that the trial court did not have the authority to consider the petitioner's entitlement to involuntary separation benefits. App. 1. The Georgia Supreme Court has refused to grant the Writ of Certiorari. App. 5 and 6.

SUMMARY OF ARGUMENT

The contract clause of the United States Constitution (Article I, Section X) limits the power of the several states to abrogate or

---

[1] OCGA § 47-2-3 (f) specifically states in part:

> The [reviewing] court may reverse or modify the decision of the employer to discharge the employee if substantial rights of the employee have been prejudiced because the administrative findings, inferences, conclusions, or decision of the employer were:
>
> (1) In violation of constitutional or statutory provisions; . . .

modify contracts. The prohibition against impairing the obligation of contracts is not absolute, but a legislative act which impairs contractual rights will be upheld only if it is both necessary to serve an important public purpose, and is reasonably designed to accomplish that purpose.

When the language of a statute and the circumstances of its enactment demonstrate a legislative intent to create private rights of a contractual nature which are enforceable against the state, that statute will be treated as a contract. Georgia's Supreme Court has consistently held that a statute establishing a retirement plan for governmental employees or officials becomes part of the employee's contract of employment. That same court has held that Georgia's impairment clause prohibits the state from reducing or eliminating any retirement rights granted by such a statute.

Georgia's 1984 statute constituted a drastic retroactive modification of the state's pension contract with its employees. That statute specifically modified the terms under which a state employee could be dismissed and divested of his vested retirement benefits. The state attempted to avoid the effect of the contract clause in its own constitution by adopting a constitutional amendment permitting retroactive modification of the retirement system. However, this Court has held that a provision of a state's constitution may be an unconstitutional impairment of rights.

The petitioner is an aggrieved party and has standing to challenge the Georgia statute. From the very beginning of this action, he has argued that the statute in question and the amendment to the state constitution are unconstitutional. The administrative law judge entered a ruling which specifically addressed the effect of the questioned statute upon the petitioner's rights. The Superior Court of Gwinnett County had the authority to consider the constitutionality of that ruling, and properly found

that the 1984 amendment and the statute implementing it are contrary to the impairment clause of the United States Constitution as applied to the petitioner.

On appeal by the state, the Georgia Court of Appeals ruled that the Superior Court was unauthorized to consider the constitutionality of the amended statute, and that the Superior Court could properly consider his entitlement to retirement benefits. As this decision appears contrary to both the United States Constitution and established Georgia statutory law, the petitioner seeks review of that decision by this court.

ARGUMENT AND CITATION OF AUTHORITIES

Article I, section X, clause 1 of the United States Constitution limits the power of the several states to impair contracts between the state and individuals. To be valid under the constitution, a state act which impairs contractual rights must be reasonable and necessary to accomplish a valid public purpose. *United States Trust Co. v New Jersey*, 431 US 1, 52 LEd 2d 92, 97 S Ct 1505 (1977); *Home Building & Loan Assn. v. Blaisdell*, 290 US 398, 78 LEd 413, 54 S Ct. 231, 88 ALR 1481 (1934).

The petitioner became an employee of the State of Georgia in 1969. When he was hired, the terms under which an employee could be dismissed from service and divested of retirement benefits were established by a statute enacted in 1968. OCGA § 47-2-1 (20) and (21).

It is well established that a state may enter into a contractual relationship with an individual by statute. *Indiana ex rel. Anderson v. Brand*, 303 US 95, 82 LEd 685, 58 S Ct 443, 113 ALR 1482 (1938). Usually, in considering cases like this, the first inquiry is whether the statutes in question in fact constitute a contractual obligation. However, the Georgia Supreme Court has specifically held that a government employee's rights under a statutory retirement plan are a contract between that employee and his employer. See *Withers v. Register*, 246 Ga. 158, 269 SE2d 431 (1980). *Bender v. Anglin*, 207 Ga. 108, 60 SE2d 756 (1950).

In 1984, the General Assembly retroactively imposed additional limitations on an employee's right to qualify for a retirement benefit after an involuntary separation, and redefined involuntary separation itself. OCGA § 47-2-2; 1984 Ga. Laws 1296. There is no question that the 1984 act constitutes a substantial retroactive modification of the statutory contract with Mr. Willis.

Even before the state constitution was amended, the State of Georgia was aware that retroactive application of these new limitations to employees already vested under the retirement system would be unconstitutional under the impairment clause of the federal constitution. See *1983 Op. Att'y. Gen. No. U83-72*. The legislature tried to circumvent the decisions of the state supreme court by amending the state constitution to allow such retroactive modifications. Ga. Constitution, Article III, Section 10, Para. 6. However, this Court has long held that a state constitution is a law within the meaning of the impairment clause, and a state may not avoid the unconstitutional effect of a law by amending the state's constitution. See *Coombes v. Getz*, 285 US 434, 76 LEd 866, 52 S Ct 435 (1932); *Fiske v. Jefferson Police Jury*, 116 US 131, 29 LEd 587, 6 S Ct 329 (1885); See also *1985 Op. Att'y Gen. No. U85-3.*

When the Department of Public Safety tried to dismiss the petitioner under the 1984 statute, he challenged the constitutionality of both the statute and the constitutional amendment. App. 9. The hearing officer's finding and recommendation was based on provisions in the 1984 statute, and clearly addressed the effect of the dismissal on the petitioner's entitlement to pension benefits under the retirement system. App. 8.

Georgia law provides for judicial review of a decision to dismiss an employee discharged under OCGA § 47-2-2. OCGA § 47-2-3. When the petitioner appealed under that statute, his dismissal, its effect upon his retirement benefits, and the constitutionality of the statute's retroactive application to him were properly before the Superior Court. The code specifically authorizes the reviewing court to reverse or modify the decision of the employer if the decision of the employer is in violation of constitutional or provisions. OCGA § 47-2-3 (f) (1). The reviewing court did so in this case, and found that the 1984 statute was unconstitutional as applied to the petitioner.

While it was not surprising that the Department of Public Safety appealed the Superior Court's decision, the decision of the Court of Appeals was unexpected. Its ruling that the Superior Court did not have the authority to consider the constitutional issue is completely contrary to the plain language of OCGA § 47-2-3. It is also contrary to the long established principle that when the constitutionality of a state statute is properly challenged, a state court has a duty to consider the validity of that statute and to hold it void if it violates the federal constitution. *Thomas v. Collins*, 323 US 515, 89 LEd 430, 65 S Ct 315 (1945).

CONCLUSION

Petitioner seeks to review the constitutional validity of Article III, Section X, Paragraph 6 of the Georgia Constitution and OCGA § 47-2-2 as they apply to persons whose benefits under the retirement system vested before their enactment. Although sanctioned by a n amendment to the state constitution, retroactive application of the 1984 statute to those employees whose benefits had already vested is clearly contrary to the impairment clause of the United States Constitution. The Attorney General has stated as much in two separate published opinions. The Georgia Court of Appeals misconstrued a procedural statute to avoid addressing the basic constitutional defect inherent in the . In doing so, it decided an important federal question in a manner which is at odds with those decisions of this court construing the impairment clause of Article I Section X of the Constitution.

Accordingly, the petitioner respectfully prays that the court grant this petition, and that the Writ of Certiorari be GRANTED.

Respectfully submitted,

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APPENDIX INDEX

Page

Appendix A
Decision of the Court of Appeals of Georgia entered August 17, 1995 ..... A-1

Appendix B
Order of the Superior Court of Gwinnett County, Georgia entered November 9, 1994 ..... A-4

Appendix C
Order of the Court of Appeals of Georgia denying Motion for Reconsideration entered September 19, 1995 ..... A-7

Appendix D
Petition for Writ of Certiorari to the Supreme Court of Georgia A-8

Appendix E
Order of Supreme Court of Georgia denying Petition for Writ of Certiorari entered January 5, 1996 ..... A-17

Appendix F
Order of the Supreme Court of Georgia denying Motion for Reconsideration entered January 26, 1996 ..... A-18

Appendix G
Notice of Intent to Apply for Certiorari to the United States Supreme Court A-19

Appendix H
Certification of Record and record before the Department of Public Safety A-21

Appendix I

Transcript of hearing before Hearing Officer Melvin M. Goldstein from April 5, 1994 ..... A-41

Appendix J

Applicable Law A-47

APPENDIX A

THIRD DIVISION
BEASLEY, C. J.,
POPE, P. J., RUFFIN, J.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

August 17, 1995

In the Court of Appeals of Georgia

A95A1034. DEPARTMENT OF PUBLIC SAFETY et al. v. WILLIS. P-072

POPE, Presiding Judge.

Petitioner David Willis, the Post Commander of a State Patrol station, was terminated for sexual harassment. An administrative hearing officer concluded that Willis' behavior constituted a "neglect of duty" warranting dismissal under OCGA § 47-2-2 (d), and gratuitously noted in his report that because Willis was being discharged for neglect of duty, his retirement benefits would be lost under the last sentence of OCGA § 47-2-2 (d): "Any employee so discharged from employment shall not be entitled to and shall not receive a retirement benefit based on involuntary separation without prejudice pursuant to Code Section 47-2-123." Willis appealed his discharge to the Superior Court under OCGA § 47-2-3. But instead of focusing on the propriety of Willis' discharge, the trial court issued an opinion declaring the last sentence of OCGA § 47-2-2 (d) unconstitutional as applied and ordering that Willis was entitled to involuntary separation retirement benefits. Because we conclude that

the trial court exceeded its authority in issuing this order, and that this is not the appropriate proceeding in which to address the question of Willis' entitlement to involuntary separation retirement benefits, we reverse the trial court's order.

Under OCGA § 47-2-3 (a) & (b), an employee "who is discharged from employment pursuant to [OCGA § 47-2-2] and who is aggrieved by such discharge from employment . . . [has] the right to judicial review *of the employee's discharge from employment* pursuant to the provisions of Code Section 47-2-2." (Emphasis supplied.) Here, the trial court focused its review not on the propriety of the discharge or even on whether Willis' conduct constituted "neglect of duty," but instead on the collateral issue of the effect of the discharge on Willis' benefits — an issue beyond the scope of review under OCGA § 47-2-3. While issues relating to the propriety of the discharge may be litigated in the context of a proceeding under OCGA § 47-2-3 — a proceeding between the employee and his employer — the employee's right to benefits must be litigated in a separate action brought against the Employees' Retirement System of Georgia ("ERS") directly. See, e.g., *Haggins v. Employees' Retirement System*, 255 Ga. 352 (2) (338 SE2d 1) (1986) (discharged employee brings petition for mandamus against ERS to determine his right to involuntary separation benefits). Cf. also *Bryant v. Employees' Retirement System*, 216 Ga. App. 737 (455 SE2d 839) (1995) (trial court in divorce action does not have authority to order ERS, a non-party, to pay a portion of husband's benefits to wife directly).

Our conclusion that an employee's entitlement to involuntary separation retirement benefits should be determined in a separate action is based not only on the language of OCGA § 47-2-3 quoted above, but also on the nature of the pivotal question to be addressed: Was the employee's discharge truly "involuntary"? In *Haggins*, the Georgia Supreme Court held that "a state employee who knowingly and intentionally causes or brings

about his own dismissal from state employment, or engages in conduct which he knew or should have known would lead to dismissal from employment, is not involuntarily separated from service within the meaning of that term in the Act governing the Employees' Retirement System of Georgia." 255 Ga. at 354 (2). Whether or not the employee knew or should have known his conduct would result in dismissal is a question of fact which the employee has a right to have a jury decide (see id. at 354 (1) & (2)) — and this right cannot be exercised in the context of a judicial review under OCGA § 47-2-3. See OCGA § 47-2-3 (e) ("The review shall be conducted by the court without a jury and shall be confined to the record.")

The trial court ruled that the portion of OCGA § 47-2-2 (d) providing that employees discharged for certain reasons (including neglect of duty) not receive involuntary separation retirement benefits could not be constitutionally applied to employees who, like Willis, were hired prior to 1984, the year OCGA § 47-2-2 (d) was enacted. Moreover, the trial court deemed the applicability of OCGA § 47-2-2 (d) dispositive of the entitlement to benefits issue: If the code section did not apply, Willis was entitled to benefits. We do not review this constitutional ruling on the merits, since it went beyond the scope of the trial court's authority under OCGA § 47-2-3. We note, however, that the applicability of that portion of OCGA § 47-2-2 (d) is not necessarily dispositive; under the *Haggins* analysis, whether Willis will be entitled to involuntary separation retirement benefits will still depend on whether a jury finds his separation was truly involuntary.

Judgment reversed. Beasley. C. J.. and Ruffin. J.. concur.

APPENDIX B

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

CIVIL ACTION
FILE NO. 94-A-3101-5

DAVID L. WILLIS,
Petitioner,

vs.

DEPARTMENT OF PUBLIC SAFETY, ET AL.,
Respondents,

ORDER

Petitioner brought this appeal from a decision of the Department of Public Safety which provided for the termination of his employment and resulted in the denial of certain retirement benefits.

Petitioner was employed by the Department of Public Safety, Georgia State Patrol, in 1969, and has been a member of the Georgia Employee Retirement System (ERS) since that time. Earlier this year, the respondents sought the termination of petitioner's employment for the "irresponsible performance of duties and neglect of duty" under 0. C. G. A. § 47-2-2. The hearing officer sustained the dismissal of petitioner on these grounds, which resulted in petitioner losing certain involuntary retirement benefits under the provisions of 0. C. G. A. § 47-2-2(d).

Under the law in effect at the time that petitioner became a member of the ERS, he would be entitled to involuntary separation retirement benefits if his termination was an involuntary separation from employment without prejudice. Ga. Laws, 1968, page 195, § 1 provides: "'Involuntary separation from employ-

ment without prejudice' . . . means separation or release from service not willingly by choice of member who has not been convicted in a court of competent jurisdiction of embezzlement or larceny of public funds or property or malfeasance in office . . . ." O. C.. G. A. § 47-2-2(d), upon which the hearing officer relied, provides that petitioner would not be entitled to "involuntary separation from employment without prejudice" status if he was discharged for irresponsible performance of duties or neglect of duty. This would have a negative effect on the retirement benefits available to the petitioner.

It is well-settled that the U.S. and Georgia constitutions prohibit the state legislature from enacting laws that impair obligations under vested contracts. Likewise:

> The Supreme Court of Georgia has plainly and consistently held that statutes establishing a retirement plan for governmental employees or officials become a part of the employee's or official's contract of employment if he at any time contributes any amount towards the benefits he is to receive, and if he performs services while the statutes are in effect. If those conditions are fulfilled, the Impairment Clause of the Georgia Constitution (Ga. Const. of 1976, Art. I, Sec. I, Par. VII; Ga. Const. of 1983, Art. I, Sec. I, Par. X) precludes the reduction, diminution or elimination of any retirement rights granted by statute. See, e.g., Withers v. Register, 246 Ga. 158 (1980); Burks v. Board of Trustees, 214 Ga. 251 (1958); Bender v. Anglin, 207 Ga. 108 (1950); Trotzier v. McElroy, 182 Ga. 719 (1936).

Attorney General Unofficial Opinion U83-72. Although the current version of O. C. G. A. § 47-2-2(d) is based on an act of the legislature which was ratified by a constitutional amendment at the 1984 general election, its application as to pre-1985 members would be unconstitutional as the courts have extended the impairment prohibition to any provisions of a state constitution that would likewise impair such contractual obligations. See

Coombes v. Getz, 285 U.S. 434 (1931); 16A Am Jur 2d, Constitutional Law, § 701, fn. 39.

While the provisions of the law in existence in 1969 when petitioner became a member of ERS do not preclude his dismissal from employment, any action by respondents that results in a reduction, diminution or elimination of retirement benefits belonging to the petitioner is in violation of the constitutional protections cited above. Therefore, this Court finds that the hearing officer erred in holding that petitioner's dismissal was with prejudice. While this Court lacks the authority to order petitioner's reinstatement, it is, however, hereby

ORDERED, that petitioner is entitled to involuntary separation retirement benefits under O. C. G. A. § 47-2-123(c).

This 9th day of November, 1994.

/s/ Ernest H. Woods, III
ERNEST H. WOODS, III, Judge,
Superior Courts of Georgia

APPENDIX C

Court of Appeals
of the State of Georgia

ATLANTA, SEPTEMBER 19, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A95A1034

DEPARTMENT OF PUBLIC SAFETY ET AL V. DAVID L. WILLIS

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin, *Clerk.*

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

CASE NO. _____
(From Georgia Court of Appeals, Case #A95A1034)

DAVID L. WILLIS,
Petitioner,

vs.

DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA, COLONEL SID MILES, COMMISSIONER, MAJOR R.C. COLEMAN, COMMANDING OFFICER, CAPTAIN DENNIS SUTTON, ADJUTANT,
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Respondents.

PETITION FOR WRIT OF CERTIORARI

Comes now the petitioner in the above-styled action, and files this his Petition for Writ of Certiorari. Petitioner seeks review of the decision of the Georgia Court of Appeals in the case of *Department of Public Safety, et. al. Appellants, vs. David L. Willis, Appellee,* Case No.A95A1034. In support thereof, Petitioner shows:

I.

JURISDICTION

This case is an Application for Certiorari to review a decision of the Georgia Court of Appeals. This Court has jurisdiction of this action under Article VI, Section VI, Paragraph V of the Constitution of Georgia The Court of Appeals reversed the decision of the lower court on August 17, 1995. Appellant's Motion for Rehearing was denied on September 19, 1995.

STATEMENT OF ISSUES

1. What is the scope of judicial review under Georgia's employee retirement statutes? [Enumeration of Error 1].

2. Is OCGA § 47-2-2 (d) unconstitutional as applied to employees hired prior to 1982? [Enumeration of Error 2].

3. Is the ruling of this Court in *Haggins vs. Employees Retirement System,* 255 Ga 352 (1986) applicable to the Petitioner? [Enumeration of Error 3].

III.

BASIS FOR GRANTING THE WRIT

The Petitioner's case involves two issues of significant importance to the public at large and the employees of the State of Georgia in particular. First is whether, under OCGA §47-2-3, a reviewing court may reverse an unconstitutional decision by a hearing officer?

The second, more important issue, is the constitutionality of OCGA §47-2-2 as applied to state employees hired before it passed in 1985? The Court of Appeals avoided ruling on the merits of this issue, holding that the issue was beyond the scope of the trial court's authority under OCGA § 47-2-3. Petitioner contends that the issue was properly raised at all levels of proceedings, was properly considered by the trial court, and should have been addressed on its merits by the Court of Appeals.

IV.

STATEMENT OF FACTS

The Department of Public Safety hired the Petitioner in 1969, as a member of the Georgia State Patrol. He has been a member of the Georgia Employee Retirement System since that time without interruption.

In 1994, the Respondents sought to terminate the Petitioner's employment for what they termed "irresponsible performance of duties and neglect of duty" under OCGA § 47-2-2. The hearing

officer sustained the dismissal of the petitioner on these grounds. This order meant that the Petitioner would lose certain involuntary retirement benefits under OCGA § 47-2-2 (d).

On appeal, the Superior Court of Gwinnett County found that the provisions of the last sentence of OCGA § 47-2-2 (d) had been enacted after the petitioner was employed by the Department of Public Safety, and was unconstitutional as applied to the Petitioner. The order further found that the Petitioner was entitled to involuntary separation retirement benefits. The Respondent's appealed, and the Court of Appeals found that the lower court had exceeded its authority in issuing its order. Petitioner's Motion for Rehearing was made and denied on September 19, 1995.

ENUMERATION OF ERRORS

1. The Court of Appeals incorrectly found that the Superior Court of Gwinnett County had exceeded the authority granted it under OCGA §47-2-3(f).

2. The Superior Court correctly found that the provisions of the last sentence of OCGA § 47-2-2 (d) are unconstitutional as applied to the Petitioner.

3. The Court of Appeals erroneously applied *Haggins vs. Employees Retirement System of Georgia, et. al.*, 255 Ga 352(1986) to this case.

VI.

ARGUMENT AND CITATION OF AUTHORITIES

1. *The Court of Appeals incorrectly found that the Superior Court of Gwinnett County had exceeded the authority granted it under OCGA §47-2-3(f).*

The Court of Appeals ruled that the superior court exceeded its authority when it found OCGA § 47-2-2 (d) unconstitutional

as applied to the Petitioner. In doing so, the Court of Appeals did not consider the plain language of OCGA §47-2-3(f). That code section plainly states that,

> "The [reviewing] court may reverse or modify the decision of the employer to discharge the employee if substantial rights of the employee have been prejudiced because the administrative findings, inferences, conclusions, or decisions of the employer were:
>
> (1). In violation of constitutional or statutory provisions;
>
> (2) In excess of statutory authority of the employer;
>
> (3) Affected by other error of law. . . ."

The plain language of the statute therefore grants the reviewing court the authority to consider and either reverse or modify any part of a hearing officer's order that violates the terms of this statute.

In *State Personnel Board vs. Morton,* 198 Ga App. 845 (1991), the Court of Appeals had before it a decision of the State Personnel Board that had been reviewed by a superior court under OCGA §45-20-9(m). The provisions of that statute are substantially similar to those of OCGA §47-2-3(f). The Court of Appeals itself held that, when reviewing a decision of a hearing officer, the reviewing court may reverse a hearing officer's decision if it prejudices substantial rights of the employee or falls within any of the categories set out in the statute. *Morton,* 198 Ga. App. 845, 847.

This interpretation of the statute's language also makes sense under the general rules of statutory construction. *Employees Retirement System of Georgia vs. Baughman,* 241 Ga. 339, 341 (1978), states that where there are two possible constructions of a retirement statute, the courts must construe that statute liberally in favor of the employee. See also *Alford vs. Public Service*

Commission, 262 Ga. 386, 388 (1992). If the provisions for judicial review under Title 45 of the Code are to any real meaning for the employee, this principle of construction must apply to both the substantive and procedural provisions of the statute. Otherwise, the reviewing court is reduced to being a rubber stamp for the employing agency.

The plain language of OCGA §47-2-3(f) and *Morton* hold that the reviewing court has the authority to consider the legality and the constitutionality of a hearing office's decision. This Court's decision in the *Baughman* and *Alford* cases indicates that the reviewing court should have such authority as a principle of statutory construction. The decision of the Court of Appeals in this case is in error, and should therefore be reversed

2. *The Superior Court correctly found that the provisions of the last sentence of OCGA § 47-2-2 (d) are unconstitutional as applied to the Petitioner.*

This case ultimately depends upon the constitutionality of OCGA § 47-2-2 (d) as applied to the Petitioner. The trial court ruled that the application of that statute to the petitioner was unconstitutional.

The Petitioner was hired by the Department of Public safety in 1969. When he was hired, the provisions of the retirement law in effect at that time became a part of his employment contract. Those provisions of his employment contract could not be modified, repealed or defeated by a subsequent act of the General Assembly. *Burks vs. Board of Trustees,* 214 Ga 251(1958). Any attempt to modify that contract of employment between the Petitioner and the State of Georgia is a violation of both the United States and Georgia constitutions. Art. I, Sect. X, U.S. Constitution; Art. I, Sect. I, Para X, Ga Constitution (1983); *Coombs vs. Getz,* 285 U.S. 434 (1931); *Withers vs. Register,* 246 Ga 158 (1980); *Burks, Supra., City of Athens vs. McGahee,* 178 Ga App. 76 (1986). Counsel for the Respondents has admitted as

much in the course of these proceedings and in previously published opinions. Appellant's Brief p.9; *Op. Atty. Gen.* U85-3, U83-72.

The code section relied upon by the hearing officer, OCGA § 47-2-2 (d), was enacted in 1984 and became law in 1985. 1984 Ga. Laws 1296, 1985 Ga. Laws 209. It purports to be supplemental to the pre-existing provisions of OCGA § 47-2-1. However, a comparison of the 1984 law with the law in effect in 1969 shows that the later statute makes major substantive changes to the earlier statute. See 1968 *Ga. Laws* 1884.

For all practical purposes, the General Assembly tried to re-write the existing contracts of state employees in 1984. A constitutional amendment approved by the voters was supposed to avoid any constitutional complications. However, the voters of Georgia cannot alter the terms of the United States Constitution by a vote in a general election.

The record below shows that the Petitioner recognized the constitutional issue at the outset of this action, and has raised the issue at each step of the proceedings. [T. 8-12]. The trial court had the constitutional issue before it, and properly considered that issue in reaching its decision. The decision of the Court of Appeals reversing the trial court's decision is plainly in error, and should be reversed.

3. *The Court of Appeals erroneously applied Haggins vs. Employees Retirement System of Georgia, et. al., 255 Ga. 352(1986) to this case.*

The cornerstone of the Court of Appeals decision is *Haggins vs. Employees Retirement System of Georgia, et. al.*, 255 Ga 352 (1986). In *Haggins,* this court held that each case involving involuntary separation rests on its own unique set of circumstances. The Court further found that, in Haggins's case, the evidence supported a jury verdict that his separation from service had been "voluntary" under the definitions set by OCGA §47-2-2.

However, in reaching its decision in *Haggins*, this Court never considered the key issue of this case; *is OCGA §47-2-2 unconstitutional as applied to state employees hired before 1985?* The constitutionality of the 1984 statute was never challenged, and so was never considered. In this case now before the Court, the state and federal constitutional issue has been before the courts from the first day of hearings. This fact alone distinguishes the Petitioner's case from the *Haggins* decision.

VII.

CONCLUSION

Wherefore the Petitioner prays that the Writ of Certiorari be granted.

This 10th day of October, 1995.

HARRISON & HARRISON
Attorneys at Law

/s/ G. Hughel Harrison
G. HUGHEL HARRISON
Ga. Bar No. 332200

/s/ Samuel H. Harrison
Ga. Bar No. 333278
ATTORNEYS FOR PETITIONER

P.O. Box 88
Lawrenceville, Ga. 30246-0088
(770) 963-3421

GEORGIA GWINNETT COUNTY

This is to certify that I have served a copy of the within and foregoing pleadings upon the Respondent by mailing the same to the Honorable Susan L. Rutherford, Senior Assistant Attorney General, 40 Capitol Square, S.W., Atlanta, Georgia, 30334-1300, in a properly addressed envelope with sufficient postage affixed thereon to assure delivery.

This 10th day of October, 1995.

HARRISON & HARRISON
Attorneys at Law

/s/ Samuel H. Harrison
SAMUEL H. HARRISON
Ga. Bar No. 333278
Attorney for Petitioner

P.O. Box 88
Lawrenceville, GA 30246-0088
Phone: (770) 963-3421
Fax: (770) 963-3600

APPENDIX E

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: January 05, 1996

Samuel H. Harrison
HARRISON & HARRISON
P.O. Box 88
Lawrenceville, GA 30246-0088

Case No. S96C0114

DAVID L. WILLIS V. DEPARTMENT OF PUBLIC SAFETY, ET AL.

COURT OF APPEALS CASE NO. A95A1034

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

_____

_____

_____

_____

Sincerely,

Sherie M. Welch, Clerk

APPENDIX F

SUPREME COURT OF GEORGIA

Case No. S96C0114

Atlanta, January 26, 1996

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DAVID L. WILLIS V. DEPARTMENT OF PUBLIC SAFETY, ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

APPENDIX G

IN THE SUPREME COURT OF GEORGIA

CASE NO. S96C0114

DAVID L. WILLIS,
Petitioner,

VS.

DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA; COLONEL SID MILES, COMMANDER; MAJOR R.C. COLEMAN, COMMANDING OFFICER; CAPTAIN DENNIS SUTTON, ADJUTANT,
Respondents.

NOTICE OF INTENT TO APPLY FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

Comes now, DAVID L. WILLIS, Petitioner in the above-styled action and files this his Notice of Intent to make application to the United States Supreme Court for the Writ of Certiorari to review the decision of the Georgia Supreme Court in which a Rehearing was denied on January 26, 1996.

HARRISON & HARRISON
Attorneys at Law

/s/ G. Hughel Harrison
G. HUGHEL HARRISON
Ga. Bar No. 332200
Attorney for Petitioner

P.O. Box 88
Lawrenceville, GA 30246-0088
Phone: (770) 963-3421

GEORGIA, GWINNETT COUNTY

This is to certify that I have served a copy of the within and foregoing Notice of Intent to Apply for Writ of Certiorari to the U.S. Supreme Court upon the Respondents by mailing the same to their attorney of record, Ms. Susan L. Rutherford, Senior Assistant Attorney General, 40 Capitol Square, S.W., Atlanta, Georgia 30334-1300, with a courtesy copy being mailed to the Honorable William L. Martin, III, Clerk, Georgia Court of Appeals, 334 State Judicial Building, Atlanta, Georgia, 30334, in properly addressed envelopes with sufficient postage affixed thereon to assure delivery.

This 21st day of February, 1996.

HARRISON & HARRISON
Attorneys at Law

/s/ G. Hughel Harrison
G. HUGHEL HARRISON
Ga. Bar No. 332200
Attorney for Petitioner

P.O. Box 88
Lawrenceville, GA 30246-0088
Phone: (770) 963-3421

APPENDIX H

IN SUPERIOR COURT OF GWINNETT COUNTY
STATE CF GEORGIA

CIVIL ACTION FILE NO.
94-A-3101-5

DAVID L. WILLIS,
Petitioner,

vs .

DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA; COLONEL SID MILES, COMMISSIONER, GEORGIA DEPARTMENT OF PUBLIC SAFETY; MAJOR R. C. COLEMAN, COMMANDING OFFICER, GEORGIA STATE PATROL, DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA; CAPTAIN DENNIS SUTTON, ADJUTANT, GEORGIA STATE PATROL, DEPARTMENT OF PUBLIC SAFETY, STATE OF GEORGIA,
Respondents,

APPEAL/PETITION FOR JUDICIAL REVIEW

CERTIFICATION OF RECORD

COMES NOW, before the undersigned officer duly authorized to administer oath, Colonel Sid R. Miles, Commissioner of the Department of Public Safety, who, after being duly sworned [sic], certifies that the attached transcript, documents and other written materials, comprises the complete record before the Department of Public Safety in the appeal pertaining to the dismissal of David L. Willis from employment with the Department of Public Safety.

/s/ Sid R. Miles
Sid R. Miles
Commissioner
Department of Public Safety

Sworn to and subscribed
before me this 13th day
of May, 1994
/s/ Lisa R. Smith
Notary Public
Notary Public, Rockdale County, Georgia
My Commission Expires March 29, 1997

Department of Public Safety
Post Office Box 1456
Atlanta, Georgia 30371-2303

Colonel Sid Miles
Commissioner

Major R.C. "Stock" Coleman
Commanding Officer

April 13, 1994

Mr. David L. Willis
c/o Mr. G. Hughel Harrison, Esq.
HARRISON & HARRISON
Post Office Box 88
Lawrenceville, Georgia 30246-0088

RE: Your dismissal from employment with the Department of Public Safety

Dear Mr. Willis:

On February 28, 1994, Captain Dennis H. Sutton, Adjutant for the State Patrol, proposed that you be dismissed from your employment with the Department of Public Safety. In that letter, he set forth the charges that he was bringing against you.

A two-day evidentiary hearing was held commencing on April 5, 1994, on these charges. That hearing was held before an independent hearing officer, Mr. Melvin M. Goldstein. On April 12, 1994, Mr. Goldstein made his findings and recommended decision based upon the evidence which he heard at that hearing. Mr. Goldstein recommended that your dismissal be upheld. (A copy of his decision is attached.)

I have reviewed the proposed dismissal letter, Mr. Goldstein's recommended decision and the record. In light of the foregoing, it is my decision that you should be dismissed effective the close of business today, April 13, 1994. This action is based upon your unfitness to perform your assigned duties, your misconduct or your conduct reflecting discredit in this department . For pur-

poses of O . C . G . A. S 47-2-2, this action is being taken for your neglect of duty in that you have sexually harassed subordinate employees when you were responsible for ensuring that there was no sexual harassment at your post. The specific conduct which forms the basis of this action is as follows:

CHARGE ONE:

In or about April, 1993, Ms. Brandalyn Thomas, a former classmate of your daughter's and a Driver's License Examiner at the State Patrol Post in Lawrenceville, resigned to accept other employment. You took her to headquarters to turn in her uniforms and her identification card. On the drive back to the Post, you told Ms. Thomas that she was attractive. You then told her that you "liked to be spanked" and asked if she liked to be spanked. Feeling uncomfortable with your line of conversation, Ms. Thomas attempted to change the subject by asking what your wife would say if she knew that you were talking to her like this. You then took a detour to show Ms. Thomas your house. After driving by your house, you then pulled off of the road. When Ms. Thomas asked why you were pulling off the road, you responded that you wanted to kiss her. She refused your advance. You finally returned Ms. Thomas to the Post. Your actions were offensive and were unwelcomed.

CHARGE TWO:

On or about December 17, 1993, you were in Corporal Daniel's office at the Lawrenceville Post with Cpl. Daniel when Ms. Aimee Knowles walked by on her break. Ms. Knowles was a twenty-two year old newly wed who worked under your supervision at the post as a typist. You told Ms. Knowles to come in the office. Cpl. Daniel left the office. You told Ms. Knowles that you were going to work out. You then told her to sign out for lunch and come back to Cpl. Daniel's office. She went back to work.

At lunch-time, Aimee Knowles bought her lunch and returned to the Post to eat it. As she walked to a TV room to eat, she had to walk by Cpl. Daniel's office. You were still in the office. You told her to come in and have a seat. She stated that she was going to eat. You told her that you wanted to talk to her before you left the post. She entered the office and you began to talk about this lady who gives you massages. You then described the lengthy massages that you receive while you are "naked" and how this lady "misses no places". You then told Ms. Knowles that maybe one day you could show her what a real massage is like.

You then locked the door, trapping Aimee Knowles in the office with you. You told her that you knew she was off on Monday. You gave her your beeper number and instructed her to call you anytime Monday morning or afternoon and you would meet her to show her what a real massage is like. Then you told her to bring her own oil.

Next you moved behind the young girl and started to massage her shoulders and head. You asked her if it felt good and told her to not tell anybody about this. You also added that she should relax and that you were not going to hurt her.

After massaging her shoulders and head, you went to the door, unlocked it and walked out of the room. As the Post commander and a man of almost fifty years old, you ordered Aimee Knowles to follow you. You then led the frightened young typist down the hall to the first bedroom on the right. You quickly led her into the empty bedroom. The room had two clean single beds with a door to the hall and a door to an adjoining bathroom. With dispatch, you shut the bathroom door. Aimee Knowles stood in the room, still clutching her Chick-Fil-A bag. You went back to the hallway door, shut it and locked it tight. Pointing to the first bed in the room, you ordered the twenty-two year old subordinate to sit on the bed. You then told her to relax as you stood in front of her and started massaging her shoulders.

You next ordered her to lay back on the bed while you remained standing in front of her in the locked room. Your hands became more adventuresome in what you called a massage. Now you were rubbing her legs, then you progressed to her thighs and ultimately you were rubbing in between her legs invading the very top of her inner leg area. While your hands were venturing across her lower body, you kept repeating to the frightened young girl, "don't be scared, I'm not going to hurt you." Finally, she pushed your hands away.

Undaunted by her protest, you redirected your efforts. You began to massage her upper chest area just below the neckline and started working your hands down her body until you were stroking her left breast with your right hand. From this position, you attempted to kiss her, but she turned her head and you only managed a kiss on her cheek. Again she tried to stop you. This time she pushed your hand from her breast, sat up on the bed and exclaimed "Stop! I've got to go."

Still you persisted. You plopped down on the bed beside her, lifted her legs, placed them over your legs and removed her shoes. You began to massage her legs and her toes. She attempted to put her shoes back on her feet, and told you "don't do that". You removed her shoes again and continued to rub her toes.

Finally, there was a noise in the hall. Startled, you got up from the bed and went to the door. Ms. Knowles regained her composure, and stood up. You grabbed her and hugged her before letting her leave the room. As she left you instructed her to call you on Monday.

Your action toward this subordinate employee was cowardly, outrageous and unwelcomed.

The conduct described in each of the charges listed above warrants your dismissal in its own right. As a post commander

in the State Patrol and a long time law enforcement officer, you knew or should have known that such action on your part would result in your dismissal. Accordingly, you are the author of your own dismissal. Therefore your discharge from employment for any of the reasons set forth in this letter does not constitute involuntary separation from employment without prejudice within the meaning of the applicable provisions of the Employees' Retirement System of Georgia and, by law, you shall not be entitled to receive and shall not receive a retirement benefit based on involuntary separation from employment without prejudice. A copy of this dismissal letter along with the record created before the Administrative Hearing Officer will be filed with the Employees Retirement System as the report filed by the Department on this adverse action.

Sincerely,

/s/ Major R.C. Coleman
Major R.C. Coleman
Commanding Officer
Georgia State Patrol

RCC:lrs

Enclosure

cc: Colonel Sid Miles
Lt. Colonel M. E. Freeman
Captain D. H. Sutton
Captain B. D. Bridges
Mr. Wayne Yancey
Ms. Cynthia Mitchell
Mr. Randolph Johnson w/enclosures

IN THE MATTER OF:	BEFORE THE
DAVID WILLIS	DEPARTMENT OF
Employee.	PUBLIC SAFETY

HEARING OFFICERS'S RECOMMENDED DECISION

The within and foregoing matter came on regularly for hearing before the undersigned Hearing officer, duly appointed by the Commissioner, Georgia Department of Public Safety on April 5, 1994 and was concluded on April 6, 1994. At the hearing Sgt. David Willis was represented by Mr. G. Hughel Harrison, Attorney at Law. The Department of Public Safety was represented by Mr. Wayne P. Yancey, Director of Legal Services, Georgia Department of Public Safety.

Based upon the evidence presented at the hearing and a review of the record the Hearing Officer makes the following recommended findings of fact and conclusions of law in this matter.

FINDINGS OF FACT

1.

Sgt. David L. Willis is employed by the Georgia Department of Public Safety and has been so employed since May 26, 1969. Sgt. Willis is currently with the Georgia State Patrol as Post Commander at Post 37 in Lawrenceville, Georgia. As Post Commander, Sgt. Willis is responsible for the overall supervision and operation of Post 37, including the well being of its personnel. State Exhibit 1.

2.

On or about February 28, 1994, the Department of Public Safety, through Capt. D. H. Sutton, Adjutant, notified Mr. Willis of the proposed action to discharge him from employment. In the letter the Employee was provided reasons for the discharge, specifically that the discharge was caused by Mr. Willis' irre-

sponsible performance of duties or neglect of duty. The notice also stated that Mr. Willis' discharge for the reasons set forth shall not constitute involuntary separation from employment without prejudice within the meaning of the Employees' Retirement System of Georgia. Mr. Willis was further advised of his right to a hearing before the Employer and his opportunity to offer explanations of his conduct and present evidence on his own behalf at such hearing.

3.

The specific charges were as follows:

"1. In or about late January or early February, 1993, you were in the radio room at the Georgia State Patrol Post in Lawrenceville, Georgia. The only other person in the room with you at the time was radio operator Deidre Thomas-Wallace. You told her that her tie tack was in the wrong location. You then grabbed her tie as if to relocate the tie tack. In doing so you reached up with your right hand, swept it across her left breast. Before reaching the tie tack, you rubbed across approximately 60% of her breast. The rub was unwelcomed and shocked Ms. Thomas-Wallace.

2. During the early part of 1993, prior to Ms. Thomas' marriage, you would frequently ask her if she had "got some yet." The comments were offensive and unwelcomed.

3. In or about April, 1993, Ms. Brandalyn Thomas, a former classmate of your daughter's and a Driver's License Examiner at the State Patrol Post in Lawrenceville, resigned to accept other employment. You took her to headquarters to turn in her uniforms and her identification card. On the drive back to the Post, you told Ms. Thomas that she was attractive. You then told her that you "liked to be spanked" and asked if she liked to be spanked. Feeling uncomfortable with your line of conversation, Ms. Thomas attempted to change the subject by asking what your wife

would say if she knew that you were talking to her like this. You then took a detour to show Ms. Thomas your house. After driving by your house, you then pulled off of the road. When Ms. Thomas asked why you were pulling off the road, you responded that you wanted to kiss her. She refused your advance. You finally returned Ms. Thomas to the Post. Your actions were offensive and were unwelcomed.

4. On or about December 17, 1993, you were in Corporal Daniel's office at the Lawrenceville Post with Cpl. Daniel when Ms. Aimee Knowles walked by on her break. Ms. Knowles was a twenty-two year old newly wed who worked under your supervision at the post as a typist. You told Ms. Knowles to come in the office. Cpl. Daniel left the office. You told Ms. Knowles that you were going to work out. You then told her to sign out for lunch and come back to Cpl. Daniel's office. She went back to work.

At lunch time, Aimee Knowles bought her lunch and returned to the Post to eat it. As she walked to a TV room to eat, she had to walk by Cpl. Daniel's office. You were still in the office. You told her to come in and have a seat. She stated that she was going to eat. You told her that you wanted to talk to her before you left the post. She entered the office and you began to talk about this lady who gives you massages. You then described the lengthy massages that you received while you are "naked" and how this lady "misses no places". You then told Ms. Knowles that maybe one day you could show her what a real massage is like.

You then locked the door, trapping Aimee Knowles in the office with you. You told her that you knew she was off on Monday. You gave her your beeper number and instructed her to call you anytime Monday morning or afternoon and you would meet her to show her what a real massage is like. Then you told her to bring her own oil.

Next you moved behind the young girl and started to massage her shoulders and head. You asked her if it felt good and told her to not tell anybody about this. You also added that she should relax and that you were not going to hurt her.

After massaging her shoulders and head, you went to the door, unlocked it and walked out of the room. As the Post commander and a man of almost fifty years old, you ordered Aimee Knowles to follow you. You then led the frightened young typist down the hall to the first bedroom on the right. You quickly led her into the empty bedroom. The room had two clean single beds with a door to the hall and a door to an adjoining bathroom. With dispatch, you shut the bathroom door. Aimee Knowles stood in the room, still clutching her Chick-Fil-A bag. You went back to the hallway door, shut it and locked it tight. Pointing to the first bed in the room, you ordered the twenty-two year old subordinate to sit on the bed. You then told her to relax as you stood in front of her and started massaging her shoulders.

You next ordered her to lay back on the bed while you remained standing in front of her in the locked room. Your hands became more adventuresome in what you called a massage. Now you were rubbing her legs, then you progressed to her thighs and ultimately you were rubbing in between her legs invading the very top of her inner leg area. While your hands were venturing across her lower body, you kept repeating to the frightened girl, "don't be scared, I'm not going to hurt you." Finally, she pushed your hands away.

Undaunted by her protest, you redirected your efforts. You began to massage her upper chest area just below the neckline and started working your hands down her body until you were stroking her left breast with your right hand.

From this position, you attempted to kiss her, but she turned her head and you only managed a kiss on her cheek. Again she tried to stop you. This time she pushed your hand from her breast, sat up on the bed and exclaimed "Stop! I've got to go."

Still you persisted. You plopped down on the bed beside her, lifted her legs, placed them over your own legs and removed her shoes. You began to massage her legs and her toes. She attempted to put her shoes back on her feet and told you "don't do that". You removed her shoes again and continued to rub her toes.

Finally, there was a noise in the hall. Startled, you got up from the bed and went to the door. Ms. Knowles regained her composure, and stood up. You grabbed her and hugged her before letting her leave the room. As she left you instructed her to call you on Monday.

Your action toward this subordinate employee was cowardly, outrageous and unwelcomed.

The conduct described in each of the charges listed above warrants your dismissal in its own right. As a commander in the State Patrol and a long time law enforcement officer, you know or should have known that such action on you part would result in your dismissal. Accordingly you are the author of you own dismissal. Therefore your discharge from employment for any of the reasons set forth in this letter does not constitute involuntary separation from employment without prejudice within the meaning of the applicable provisions of the Employees' Retirement System of Georgia and that if discharged, you shall not be entitled to receive and shall not receive a retirement benefit based on involuntary separation from employment without prejudice."

4.

The first two charges contained in the proposed adverse action dealt with Deidre Wallace. In January and February, 1993, Deidre Wallace was employed by the Georgia State Patrol as a Radio Operator at the Lawrenceville Post. (Volume I, T-29-30). At that time, Sgt. David L. Wilis was one of her supervisors. Ms. Wallace testified that an incident occurred while she was on radio duty in either late January or early February, 1993. (Volume I, T-30). Allegedly dissatisfied with the position of the tie tack on her uniform, SFC Willis grabbed her tie, brushing her breast with his hand. (Volume I, T-33). According to Ms. Wallace, Mr. Willis also made inappropriate comments to her during that same period. These included his preference to do it "sex doggy style" as well as asking Ms. Wallace if she "had got some?" when referring to her boyfriend. (Volume I, T-34-35). Ms. Wallace found these comments to be offensive. Further, Ms. Wallace testified that any sexual advances by Sgt. Willis were unwelcomed by her. (Volume I, T-32, 35).

During the summer, 1993, Ms. Wallace filed a charge with EEOC concerning sexual harassment against Mr. David L. Willis. (Volume I, T-32).

5.

In response to both of these charges, SFC willis denied the same.

As to the first charge, Mr. Willis recalled correcting Ms. Thomas on several occasions as to where her tie tack should be. He recounted that the previous Director of the Department of Public Safety, Colonel Bowman, changed the location of the name plate, badge and tie tack. (Volume II, T-127). He remembered Ms. Thomas coming in one day with the tie tack out of place. He indicated that he disliked Ms. Thomas and did not touch her breast. (Volume II, T-128).

In response to the second charge, Sgt. Willis stated that he had personal animosity toward Ms. Thomas and that he spoke to her only when necessary. (Volume II, T-129).

6.

As to the first charge the Hearing Officer finds it difficult to determine whether Sgt. Willis grabbed Ms. Wallace's tie with the intent of touching her breast. The Hearing Officer believes from the demeanor of the witnesses that there is animosity between the two of them. However, the Hearing officer is unable to conclude whether Sgt. Willis reached for the tie tack with the specific intent of rubbing Ms. Wallace's breast in a sexual nature.

7.

Similarly, as to the second charge, the Hearing Officer is unable to conclude whether during the early part of 1993, Sgt. Willis frequently made offensive and unwelcomed sexual comments to Ms. Thomas.

8.

Until April, 1993, Ms. Brandalyn Thomas was employed by the Georgia State Patrol as a License Examiner at the Lawrenceville Post. (Volume I, T-52-53). She resigned her position in April, 1993 to accept a position with the Florida State Highway Patrol. At that time, David L. willis was one of her supervisors. (Volume I, T-53).

On her last day of employment, SFC willis took Ms. Thomas to State Patrol Headquarters to turn in her uniforms and other equipment. (Volume I, T-54).

On the return trip to the Post, SFC Willis told Ms. Thomas how attractive she was. He also told her that he liked to be "spanked" and asked if she liked to be spanked also. (Volume I, T-56, 87). Ms. Thomas attempted to ignore Sgt. Willis' comments by

asking what his wife would say. Sgt. Willis detoured from the normal route to show Ms. Thomas where he lived. (Volume I, T-58). According to Ms. Thomas, Sgt. willis then pulled his vehicle off the road and attempted to kiss her. (Volume I, T-57). When Ms. Thomas refused the kiss, Sgt. Willis drove her back to the Post. When they arrived at the Post, Sgt. Willis mentioned getting a hotel room and gave Ms. Thomas his beeper number. (Volume I, T-58-59).

Ms. Thomas was embarrassed and stated that Sgt. Willis' advances were unwelcomed and offensive. (Volume I, T-58-59). The evidence indicated that Ms. Thomas did not attend her going away party to avoid any further confrontations with Mr. Willis.

9.

In response to this allegation, Mr. Willis denied that he ever pulled off the road to attempt to kiss Ms. Thomas. (Volume II, T-132). Further, he alleged that while they were returning to the Post on I-85 near the Jimmy Carter Blvd. exit, Ms. Thomas sat up in her seat and kissed him on the cheek. (Volume II, T-131). Further, Sgt. Willis set forth that it was Brandy Thomas who asked him for his beeper number. (Volume II, T-131).

10.

As to the third charge, in weighing the totally conflicting testimony of the witnesses, the Hearing Officer found one of Ms. Thomas' answers to be what he would expect from a young woman in that situation. Consider the following testimony:

"Q. Why did you not attend it?

A. I just — it was just — I just wanted to leave. I didn't — I just didn't want to make him angry, make the situation bad. He was giving my references. He had already given me good references for my job in Florida. I kind of wanted it just to end like that. He had never been a bad boss to me. He had never bothered me any other time, you know, anything

of that nature. so I just kind of didn't want to deal with the situation." (Volume I, T-59).

11.

Considering the parties' relative ages, the Hearing Officer finds this testimony to be more credible than the testimony of Sgt. Willis who maintained that Ms. Thomas made the advances to him. Accordingly, the Hearing Officer finds and concludes that with respect to the third set of charges relating to Ms. Thomas, Sgt. Willis made sexual remarks to her and attempted to kiss her. The Hearing Officer further finds that Mr. willis' actions were offensive and unwelcomed.

12.

The final allegations contained in the notice of adverse action dealt with Ms. Aimee Knowles, who was employed by the Georgia State Patrol as a typist in its drivers license facility located at Post 37. (Volume I, T-97). At that time, Sgt. David L. willis was one of Ms. Knowles supervisors.

According to Ms. Knowles, on or about December 17, 1993, Sgt. Willis called her into the office of Cpl. Ron Daniel. (Volume I, T-99). Sgt. Willis started talking to Ms. Knowles about massages, explaining that he had received many of them and would like to show her what a real massage was like. (Volume I, T-1OO). He then moved behind her to massage her shoulders and told her to relax. Sgt. Willis also talked to her about her days off and gave Ms. Knowles his beeper number.

According to Ms. Knowles, Sgt. willis went down the hall directing her to follow him. He led her to the barracks into the first bedroom on the right. (Volume I, T-102-103). Sgt. Willis then directed Ms. Knowles to sit down and started rubbing her shoulders, neck and back of her head. According to Ms. Knowles, Sgt. Willis laid her back on the bed and began massaging her legs. Ms. Knowles testified that she finally pushed away Sgt.

Willis' hands. (Volume I, T-103-106). Ms. Knowles recounted that Sgt. Willis massaged her shoulders and chest area and touched her left breast whereupon she pushed him away. (Volume I, T-105). Further, Sgt. Willis tried to kiss Ms. Knowles. Thereafter, he sat down beside her and started massaging the bottom parts of her feet and legs. Finally, both parties heard a noise and Ms. Knowles was allowed to leave the room by Sgt. Willis. (Volume I, T-106). According to Ms. Knowles, these sexual advances were unwelcomed and have affected her ability to work. (Volume I, T-106-107).

13.

In his defense, Sgt. Willis testified that he met with Ms. Knowles to discuss her previous sexual encounter with Mr. Jamie Ricketts, a fellow license examiner employee. According to Mr. Willis, he simply told her not to have sex with Mr. Ricketts at the Post again. (Volume II, T-195). Mr. Willis stated that this matter was discussed in the bedroom since he was attempting to be discrete with Ms. Knowles. (Volume II, T-195). Mr. Willis testified that they hugged each other at the end of the discussion and walked out of the room. (Volume II, T-135, 177).

14.

In weighing the testimony of the parties, the Hearing Officer finds it more believable that Sgt. Willis took Ms. Knowles back to the bedroom for the purpose of having sex with her after he had discussed Mr. Ricketts' sexual encounter with Ms. Knowles. (Volume II, T-192). Accordingly, with respect to the fourth charge, the Hearing Officer finds and concludes that on or about December 17, 1993, Sgt. Willis made sexual advances to Aimee Knowles, including massaging various parts of her body, taking her into a bedroom, locking the doors and rubbing her legs. Sgt. Willis also massaged Ms. Knowles shoulders and chest area, touched her breast and attempted to kiss her. The Hearing Officer

finds that these sexual advances made by SFC Willis were offensive and unwelcomed.

15.

In addition to his defenses to the specific charges, Sgt. Willis presented numerous impressive character witnesses from within the law enforcement community as well as the community at large. Many attested to his fine character and the belief that he would be incapable of any type of sexual harassment.

CONCLUSIONS OF LAW

1.

The Department of Public Safety complied with the procedural requirements set forth in O.C.G.A. §47-2-2(g).

2.

> O.C.G.A. §47-2-2(d) provides: An employee may be discharged from employment pursuant to the requirements of this Code section for insubordination, irresponsible performance of duties, malingering, neglect of duty, or unsatisfactory performance of duties in a willful manner or any combination of such reasons. Any employee so discharged from employment shall not be entitled to and shall not receive a retirement benefit based on involuntary separation from employment without prejudice pursuant Code §47-2-123.

Further, O.C.G.A. §47-2-2(c)(5) defines irresponsible performance of duties as follows:

> "Irresponsible performance of duties" means the performance of any duties by an employee or the use of an employee's position of employment for any one or more of the following purposes:

(A) To make a financial gain or receive materials or services having financial value, except compensation received as an employee, under circumstances which would lead a reasonable person to believe that the financial gain or the receipt of materials or services was improperly related to the performance of duties by the employee;

(B) To purchase or authorize the purchase of materials or services from public funds when the employee knows or reasonably could be expected to know that the amount paid for such materials or services unreasonably exceeds the amount for which substantially equivalent materials or services could be purchased without excessive delay or inconvenience;

(C) To use publicly owned real or personal property or publicly supplied services for personal use when the employee knows or reasonably could be expected to know that such personal use of public property or services is unauthorized or improper; or

(D) To expend or authorize the expenditure of public funds in a manner which would lead a reasonable person to believe the employee shows a reckless disregard for the obligation to taxpayers to expend public funds in a prudent and efficient manner.

Finally, O.C.G.A. §47-2-2(c)(7) defines neglect of duty as follows:

"Neglect of duty" means the repeated failure by an employee to carry out the employee's duties, either because of excessive unexcused absences from work or a failure to perform or the unsatisfactory performance of duties while at work or a combination thereof.

3.

The Hearing Officer finds and concludes that the evidence sustained the allegations contained in paragraphs 3 and 4 of the charges. Those findings of fact indicate that the Employee may be discharged for neglect of duty within the meaning of O.C.G.A. §47-2-2(c)(7) thereby subjecting his retirements benefits to the provisions of O.C.G.A. §47-2-2(d).

RECOMMENDED DECISION

To use one's position to attempt to obtain sexual favors from a subordinate is clearly sexual harassment. Sexual harassment in the workplace cannot be tolerated.

Nonetheless, the most difficult portion of this case is the recommendation as to punishment. It appears that sexual activity at Post 37 was not a rarity. The Hearing Officer feels that Sgt. Willis should not be singled out for punishment for conduct if the same is widespread throughout the State Patrol. However, the only people who can address that issue are the members of the appointing authority. Accordingly, the Hearing Officer feels that he must defer to the appointing authority and affirm its proposed action of dismissal.

This 12 day of April, 1994.

/s/ Melvin M. Goldstein
MELVIN M. GOLDSTEIN
Hearing Officer

APPENDIX I

BEFORE THE GEORGIA DEPARTMENT OF
PUBLIC SAFETY

IN THE MATTER OF:
DAVID L. WILLIS

The hearing in the above-captioned matter, with HEARING OFFICER MELVIN M. GOLDSTEIN presiding, taken before Tammy Lynch Reddy, Deposition Officer and Certified Court Reporter, commencing at approximately 9:24 a.m. Tuesday, April 5, 1994, at the Georgia State Patrol Office, 567 Swanson Drive, Lawrenceville, Georgia, Georgia.

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APPEARANCES

The Hearing Officer:

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(404) 427-7004

On Behalf of the Department:

WAYNE P. YANCEY, DIRECTOR OF LEGAL SERVICES
MELISSA J. LUNSFORD, LEGAL ADVISOR
GEORGIA DEPARTMENT OF PUBLIC SAFETY
959 East Confederate Avenue
Atlanta, Georgia 30316
(404) 624-7423

On Behalf of Mr. Willis:

G. HUGHEL HARRISON, ATTORNEY AT LAW
151 Pike Street North
Lawrenceville, Georgia 30245-0088
(404) 963-3421

Also Present:

David L. Willis

* * *

[6]

PROCEEDINGS

THE HEARING OFFICER: Are we ready to proceed?

MR. YANCEY: Yes, Your Honor.

THE HEARING OFFICER: Okay, this is the matter of David L. Willis, before the Georgia Department of Public Safety. My name is Melvin Goldstein and I've been appointed to act as Hearing Officer in this matter, pursuant to a letter which is part of the record in this matter dated March 14, 1994 from Colonel Sid Miles appointing me to hear the matter.

The Employee is present and represented by Mr. G. Hughel Harrison, Attorney at Law. Appearing on behalf of the Department is Mr. Wayne Yancey and Ms. Melissa Lunsford.

I note for the record that there is a letter of proposed adverse action — I didn't know, Mr. Yancey, whether you intended to introduce the letter into evidence?

MR. YANCEY: I think it's just part of the record. It's procedural. It's not evidence.

THE HEARING OFFICER: (illegible) setting forth [7] the charges in this case, and the legal authority for this hearing, as well as the statute involved in this case.

Is there anything we need to address preliminarily?

MR. HARRISON: Yes, Your Honor. I want to make sure on the record that I understand the purposes outlines in the February 28, 1994 letter, that we are proceeding under O.C.G.A. 47-2-2, and make sure that we are proceeding under that code section.

THE HEARING OFFICER: That was my understanding.

MR. YANCEY: That one, and I guess also 47-2-123. We're proceeding under the retirement law.

MR. HARRISON: But you're proceeding under 47-2-2 insofar as the charges are concerned; is that correct?

MR. YANCEY: That's correct.

MR. HARRISON: All right, in your letter — the letter which contains that the general reason for your dismissal include: (1) your irresponsible performance of duties, and (2) your neglect of duty.

[8]

Are those the charges that we're trying under?

MR. YANCEY: Yeah.

MR. HARRISON: 47-2-2?

MR. YANCEY: I guess what the letter says.

MR. HARRISON: It's what the letter says.

MR. YANCEY: Uh-huh.

MR. HARRISON: I just want to make sure there's no misunderstanding.

MR. YANCEY: That's correct.

MR. HARRISON: All right, so that will be the scope of the hearing? It will be those two specific charges under 47-2-2?

MR. YANCEY: Yes.

MR. HARRISON: All right, sir. Your Honor, there's another matter I think should be brought to the attention of the Board — or to the Hearing Officer.

If I understand correctly, this hearing was set as a proposal for the dismissal of Sergeant Willis. I don't know if you have

received the March 28, 1994 letter or whether that has been made a part of it. I would [9] submit that the reading of that letter would indicate that the dismissal has been accomplished at this point, even though the effective date of the termination is delayed until April 12th, by him being on administrative leave or leave without pay from the 31st through the termination date.

THE HEARING OFFICER: Did you want to respond, Mr. Yancey?

MR. YANCEY: Yes.

No, the termination date is still proposed. It's proposed as April 12th, and what that letter did was, since there was a delay request of the Employee, he was placed on leave without pay from the originally proposed termination date until the new proposed termination date, instead of leave with pay, since there was a delay at their request.

THE HEARING OFFICER: So that was the sole —

MR. YANCEY: The sole purpose.

THE HEARING OFFICER: — purpose of that letter?

MR. HARRISON: Now, are we disputing [10] that his pay is ended on March 31st?

MR. YANCEY: As it stands now, he's on leave without pay, yes.

MR. HARRISON: All right, and I noticed today in one of the notices here that he is —

(WHEREUPON, there was a brief interruption.)

MR. HARRISON: The reason I raised the question is I noticed on some of your material here in Post today that he has been dismissed. So my question — I raise that for the fact that, I think for all practical purposes, Mr. Willis has been terminated

and there is just a question of the terminology, because the termination date, even though it reads April 12th, in effect, his pay stops March 31st, which has passed.

I would also like to reserve any and all rights that might have accrued to Sergeant Willis under and by virtue of the retirement laws in existence prior to the adoption of 47-2-2. It is our position that once there was a legislative enactment, under England v. City of Atlanta, and that there became a [11] contract between the State and Sergeant Willis that would not be affected by, or in any way diminished by the adoption of 47-2-2 in 1984 or its amendment in 1993.

With that, Your Honor, we are prepared to proceed.

THE HEARING OFFICER: All right, off the record for a minute — and your objection is noted for the record.

(WHEREUPON, a brief discussion ensued off the record.)

THE HEARING OFFICER: Did you want to respond to any of that, Mr. Yancey?

MR. YANCEY: My only response, I think to the comments about the retirement law, I think that's just preserving the record and really is not something involved in this particular case, as far as the appeal before the Department is concerned, except that the changes in the law but clarifications. And as far as whether or not he's actually been dismissed, he has not been dismissed. There is a proposed dismissal set for April 12th, and that date can be subject to change * * *

APPENDIX J

ARTICLE I

IN GENERAL

47-1-1. Intent of codification and enactment of this title.

The enactment of Title 47 of this Code is intended only as a recodification of the existing laws of this state relating to retirement and pensions. The codification and enactment of this title are not intended to nor shall they be construed to increase, diminish, grant, destroy, impair, alter, or otherwise affect any pension, retirement benefit or allowance, survivor's benefit, membership or right to membership, creditable service or right thereto, prior service or right thereto, membership service or right thereto, or any option, election, or right of any kind which is in existence on November 1, 1982.

47-1-2. Pooling of funds by retirement systems for investment purposes; accounting practices with regard to pooled funds.

(a) The boards of trustees or directors, by whatever name known, of any two or more retirement systems created by general law, pursuant to the mutual consent of such boards, may pool their trust funds for the purposes of joint investment. The board of trustees or directors, by whatever name known, of any two or more local retirement systems funded by a single political subdivision may likewise pool their trust funds for the purposes of joint investment. When such pooling occurs, the board of trustees of the managing retirement system shall account for the pooled trust funds in accordance with generally accepted principles of accounting, in order to maintain separate accountability of such funds while under its management.

(b) The pooled trust funds may be invested in accordance with Chapter 2 of this title, relating to the Employees' Retire-

ment System of Georgia, notwithstanding any other provisions of law to the contrary.

(c) Nothing in this Code section shall establish a legal provision for combining the Employees' Retirement System of Georgia with the Teachers Retirement System of Georgia. (Ga. L. 1974, p. 1178, § 1; Ga. L. 1991, p. 994, § 1.)

The 1991 amendment, effective April 11, 1991, substituted "created by general law" for "financed by state tax funds" in the first sentence of subsection (a).

* * *

ARTICLE 2

RESTRICTIONS AND PROHIBITIONS ON MEMBERSHIP IN ' PUBLIC RETIREMENT OR PENSION SYSTEMS

OPINIONS OF THE ATTORNEY GENERAL

Forfeiture of benefits by employees convicted of crime. — The General Assembly has the authority to enact a statute which proposes the forfeiture of earned retirement benefits of future public employees due to the conviction of a crime; however, an amendment to the Georgia Constitution proposing such a forfeiture by employees who are currently by law vested with rights under the public retirement system would, in all probability, be unconstitutional under the federal Impairment clause contained in U.S. Const. Art I, § 10, 1985 Op. Att'y Gen. No. U85-3.

47-1-20. Definitions.

As used in this article, the term:

(1) "Conviction" means a judgment of conviction for the commission of a crime which is entered upon a verdict or plea of guilty.

(1.1) "Drug related crime" means a felony specified in subsection (b) of Code Section 16-13-30 and any felony specified in Code Section 16-13-31.

(2) "Employee contribution" means that part of the compensation of a public employee which is paid by the employee or by the employer on the employee's behalf to a public retirement system as a requirement for membership in the public retirement system.

(3) "Final conviction" means a conviction which has been upheld after the convicted person has exhausted all appeals of the conviction.

(4) "Political subdivision" means any county, municipality, or local school district.

(5) "Public employee" means elected and appointed officials and employees of the state or any branch, department, board, bureau, commission, authority, or other agency of the state and elected and appointed officials and employees of any political subdivision or authority or other agency of a political subdivision.

(6) "Public employment related crime" means any one or more of the following crimes:

(A) Theft as provided in any one or more of Code Sections 16-8-2 through 16-8-9 when the theft is by an officer or employee of a government in breach of duties as such officer or employee and conviction for such crime is punishable under paragraph (2) of Code Section 16-8-12;

(B) Any felony provided for in Article 1 of Chapter 10 of Title 16, relating to abuse of governmental office;

(C) Making false statements or concealing facts in matters within the jurisdiction of the state or a political subdivision as provided in Code Section 16-10-20;

(D) Conspiracy to defraud the state or a political subdivision as provided in Code Section 16-10-21;

(E) Stealing, altering, or concealing public records as provided in Code Section 45-11-1; and

(F) Selling offices or dividing fees as provided in Code Section 45-11-2.

(7) "Public retirement system" means any retirement or pension system now or hereafter created by or pursuant to the authority of Georgia law or the Constitution of Georgia which has public employees as members of the retirement or pension system.

(8) "Vested" means having sufficient creditable service as a member of a public retirement system to qualify to receive a retirement benefit upon retirement or termination from public service or upon attaining retirement age if public service is terminated prior to attaining such age. (Code 1981, § 47-1-20, enacted by Ga. L. 1985, p. 1624, , § 1; Ga. L. 1990, p. 2019, § 1.)

47-1-21. Termination of membership in public retirement system for committing public employment related crimes; applicability to employees on July 1, 1985; determination of benefits.

(a) This Code section shall apply to public employees in service on July 1, 1985, as long as such employees remain in continuous service as public employees. Any public employee in service on July 1, 1985, who ceases to be a public employee on or after that date and who subsequently again becomes a public employee shall be subject to the provisions of Code Section 47-

1-22 upon again becoming a public employee. Any person who was a public employee prior to July 1, 1985, and who ceased to be a public employee prior to that date shall be subject to the provisions of Code Section 47-1-22 if such person again becomes a public employee after July 1, 1985.

(b) If a public employee commits a public employment related crime on or after July 1, 1985, in the capacity of a public employee and is convicted for the commission of such crime, such employee's membership in any public retirement system shall terminate on the date of final conviction and such employee shall not at any time thereafter be eligible for membership in any public retirement system. For any such public employee finally convicted for the commission of a public employment related crime, the right to any benefit or any other right under any public retirement system in which the employee is a member shall be determined as of the date of final conviction. (Code 1981, § 47-1-21, enacted by Ga. L. 1985, p. 1624, § 1.)

* * *

ARTICLE I

GENERAL PROVISIONS

47-2-1. Definitions.

As used in this chapter, the term:

(1) "Accumulated contributions" means the sum of all the amounts deducted from the compensation of a member and credited to his individual account in the annuity savings fund, together with regular interest thereon. Beginning July 1, 1980, "accumulated contributions" also includes the amount of employee contributions paid by the employer on behalf of the employee and credited to the employee's individual account in the annuity savings fund, together with regular interest thereon.

(2) "Actuarial equivalent" means a benefit of equal value when computed at regular interest upon the basis of the mortality tables last adopted by the board of trustees.

(3) "Annuity" means annual payments for life derived from the accumulated contributions of a member.

(4) "Annuity reserve" means the present value of all payments to be made on account of an annuity, or benefit in lieu of an annuity, computed at regular interest upon the basis of the mortality tables last adopted by the board of trustees.

(5) "Annuity savings fund" means the fund set forth under Code Section 47-2-51.

(6) "Average final compensation" means the average annual earnable compensation of any employee during his last five years of creditable service or, if he has had less than five years of creditable service, his average annual earnable compensation during his total creditable service.

(7) "Beneficiary" means any person in receipt of a pension, an annuity, a retirement allowance, or other benefit under this chapter.

(8) "Board of trustees" means the board of trustees provided for in Code Section 47-2-21 to administer the retirement system.

(9) "Commencement date affecting employers operating under a merit system of personnel administration at the time of the passage of this chapter" means January 1, 1950. Anything in this chapter to the contrary notwithstanding, any employee of an employer which is not operating under the retirement system who, without a break in service, becomes an employee of an employer which is operating under the retirement system, within two years of the com-

mencement date affecting such employer, shall have a commencement date as of the date employment with the latter department became effective; and in such cases all other dates found in this chapter shall be set in the same relation to his commencement date as they would otherwise be set in relation to the commencement date affecting such employer.

(10) "Commencement date affecting employers that after February 3, 1949, operate under a merit system of personnel administration or those employers for which funds are not available on that date under Code Section 47-2-87" means: if the employees of any employer shall hereafter become eligible for inclusion in the Employees' Retirement System of Georgia, the commencement date set for such employer by the board of trustees shall be not less than six months or more than 12 months from the date such employer becomes eligible for membership; and all other dates mentioned in this chapter shall be set in the same relation to this commencement date as they would otherwise be set in relation to the commencement date in the original chapter, provided that in the application of dates to subsection (a) of Code Section 47-2-96, no date shall be later than July 1, 1953. Anything in this chapter to the contrary notwithstanding, any employee of an employer which is not operating under the retirement system who, without a break in service, becomes an employee of an employer which is operating under the retirement system, within two years of the commencement date affecting such employer, shall have a commencement date as of the date employment with the latter employer became effective; and in such cases all other dates found in this chapter shall be set in the same relation to his commencement date as they would otherwise be set in relation to the commencement date affecting such employer.

(11) "Court of record" means state courts, city courts, superior courts, the Georgia Court of Appeals, and the Supreme Court of Georgia handling within their jurisdiction general state law exclusively. This definition shall have no effect on creditable service determined or prior service certificates issued by the board of trustees before February 13, 1956.

(12) "Credit" means creditable service, as defined in this Code section.

(13) "Creditable service" means prior service plus membership service.

(14) "Division A" and "Division B" mean the divisions within the retirement system of members who are part of the Employees' Social Security Coverage Group, as set forth in Code Section 47-2-71, and those who are not, respectively.

(15) "Earnable compensation" means the full rate of regular compensation payable to a member employee for his full normal working time, excluding any supplements from local funds. In cases where compensation includes maintenance, the board of trustees shall fix the value of that part of the compensation not paid in cash.

(16) "Employee" means:

(A) Any regularly classified worker, elected or appointed officer, or employee of a state agency or any employee of a county, city-county, or city board, which agency or board is under a state merit system of personnel administration, including a merit system for employees of the Department of Public Safety;

(B) Any employee or officer of any other department, bureau, board, institution, or commission of the state:

(i) Which department, bureau, board, or commission operates under a merit system of personnel administration;

(ii) Which department operates under a tenure system as established by law; or

(iii) Which department, bureau, board, or commission becomes eligible for inclusion in the retirement system by Act of the General Assembly;

who receives payment for performance of personal services from the state or any department, bureau, institution, board, or commission of the state or from a county, city-county, or city board and who is employed in a position normally requiring actual performance of duty during not less than nine months of the year. "Employee" shall not include members of the Teachers Retirement System of Georgia or members of the Public School Employees Retirement System;

(C) Any other provisions of law to the contrary notwithstanding, any and all civilians who are employed in or with the Army National Guard of Georgia and the Air National Guard of Georgia shall, upon establishment of a merit system or such civilian employees and upon the approval of the adjutant general, be entitled to the retirement allowances, benefits, and privileges provided by this chapter, notwithstanding that such employees may be paid by federal funds. No credit shall accrue to such civilian employees for any service rendered prior to the effective date of coverage under the retirement system. The adjutant general is authorized to make such arrangements and agreements as may be necessary or proper in order to effect deductions from the salaries or wages of such civilian employees as may be necessary or proper in the administration of the

retirement system as to such civilian employees. It is the intent of the General Assembly that such persons be included in this definition only if federal funds are available for payment of employer contributions for such employees and other expenses of participation.

(16.1) "Employee" may include new certified professional personnel employed on and after July 1, 1983, for the first time by the State Board of Education or by the State Department of Education only if such personnel elect membership in the retirement system pursuant to subsection (h) of Code Section 47-3-60. As used in this paragraph, the term "certified professional personnel" shall have the meaning provided for in paragraph (8.1) of Code Section 47-3-1.

(16.2) "Employee" shall not include certified professional personnel who are in the unclassified service of the State Merit System of Personnel Administration and who are employed by the State Board of Education or by the State Department of Education and who elect to become members of the Teachers Retirement System of Georgia pursuant to the authority of subsection (i) of Code Section 47-3-60. As used in this paragraph, the term "certified professional personnel" shall have the meaning provided for in paragraph (8.1) of Code Section 47-3-1.

(16.3) "Employee" may include persons employed on and after July 1, 1987, for the first time by the Department of Technical and Adult Education or by postsecondary vocational-technical schools governed by the Department of Technical and Adult Education only if such personnel elect membership in the retirement system pursuant to subsection (j) of Code Section 47-3-60.

(16.4) "Employee" shall not include persons who are employed by the Department of Technical and Adult Edu-

cation or by a postsecondary vocational-technical school governed by the Department of Technical and Adult Education and who elect to become members of the Teachers Retirement System of Georgia pursuant to the authority of subsection (j) of Code Section 47-3-60.

(16.5) "Employee" shall not include personnel employed by the State Board of Education or by the State Department of Education who are authorized to elect and elect to become or remain members of the Teachers Retirement System of Georgia pursuant to applicable provisions of Chapter 3 of this title.

(17) "Employer" means:

(A) The state or any department, bureau, institution, board, or commission of the state or any county, city-county, or city board, the employees of which are under a state merit system of personnel administration, including a merit system for employees of the Department of Public Safety, and all state departments under a tenure system as established by law, provided that such county, city-county, or city board may notify the board of trustees that it will not participate in the benefits of the retirement system, such notice to be given in writing on or before the commencement date or before persons are employed by it. Any employee of a county, city-county, or city board having an existing local retirement system may elect to continue to participate in such existing local system but shall not participate in two systems, and his election shall be final on the commencement date under this chapter. Any county, city-county, or city employee who elects to become a member of this retirement system and who was a member of an existing local retirement system shall transfer to the board of trustees any equity he has in the local system.

(B) Any other provisions of law to the contrary notwithstanding, the adjutant general is authorized, though not directed, to establish a merit system and to perform all of the duties and obligations of an "employer" for all civilians employed in or with the Army National Guard of Georgia and the Air National Guard of Georgia, even though such employees may be paid with federal funds. The adjutant general is further authorized to make and enter into such agreements and take such actions as are necessary to provide for all contributions and payments specified in this chapter, from funds made available by the federal government, and otherwise to comply with this chapter so as to make this chapter applicable to such civilian employees.

(18) "Expense fund" means the fund set forth under Code Section 47-2-60.

(19) "Group term life insurance" means the survivors benefits established under Code Section 47-2-128.

(20) "Involuntary separation from employment without prejudice" means separation or release from service other than by the willing choice of a member, provided that such member has not been convicted in a court of competent jurisdiction of any crime involving moral turpitude or malfeasance in office or has not been forced to make restitution for any funds or property wrongfully taken by the member. Involuntary separation shall not include the defeat in an election of an elected official who becomes a member of this retirement system for the first time on or after July 1, 1971.

(21) "Involuntary separation from employment with prejudice" means separation or release from service other than by the willing choice of a member who has been

convicted in a court of competent jurisdiction of a crime involving moral turpitude or malfeasance in office or who has been forced to make restitution for any funds or property wrongfully taken by the member.

(22) "Medical board" means the board of physicians established under Code Section 47-2-24 for the purpose of arranging for and passing upon medical examinations required under this chapter.

(23) "Member" means any employee included in the membership of this retirement system. On and after July 1, 1967, no employee shall become a member unless his position with an employer, as defined in paragraph (17) of this Code section, is his primary occupation and such position requires that the employee spend at least the number of hours specified in regulations adopted by the board of trustees in the actual performance of his duties, provided that in no case shall the number of hours be less than 30 hours per week during at least nine months of a year.

(24) "Membership service" means service which is rendered by an employee while he is a member of the retirement system and for which credit is allowable under this chapter.

(25) "Option one," "option two," "option three," and "option four" mean the optional forms in which a member may elect to receive his retirement allowance, which options are set forth in Code Section 47-2-121.

(26) "Pension" means periodic payments for life derived from contributions of the state.

(27) "Pension accumulation fund" means the fund set forth in Code Section 47-2-55.

(28) "Pension reserve" means the present value of all payments to be made on account of a pension, or benefit in

lieu of a pension, computed at regular interest upon the basis of the mortality tables last adopted by the board of trustees.

(29) "Prior service" means service rendered prior to January 1, 1954, for which credit is allowable under this chapter.

(30) "Prior service certificate" means the certificate issued to a member under this chapter as proof of his prior service.

(31) "Regular interest" means interest at such a rate as shall be determined by the board of trustees in accordance with Code Section 47-2-26, which interest shall be compounded annually.

(32) "Retirement" means withdrawal from service with a retirement allowance granted under this chapter.

(33) "Retirement allowance" means the sum of the annuity and the pension, or any optional benefit payable in lieu thereof. All retirement allowances shall be payable in equal monthly installments, except that the board of trustees may adopt regulations providing for the payment of a lump sum, not to exceed the equivalent actuarial value of the retirement allowance, in lieu of a retirement allowance of less than $10.00 per month or in lieu of part of an annuity.

(34) "Retirement system" means the Employees' Retirement System of Georgia.

(35) "Service" means service rendered as an employee and paid for by an employer.

(36) "Service credit" means creditable service, as defined in this Code section.

(37) "Within one year after discharge from the armed forces" means within one year after the termination of the

member's active service in the military or naval forces of the United States and shall not include any military reserve or naval reserve service. (Ga. L. 1949, p. 138, § 1; Ga. L. 1950, p. 416, § 1; Ga. L. 1951, p. 394, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 349, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 160, § I; Ga. L. 1956, p. 54, § l; Ga .L. 1961, p. 101, §§ 1,2; Ga. L. 1961, p. 143, § 1; Ga. L. 1967, p. 751, § 1; Ga. L. 1968, p. 195, § 1; Ga. L. 1971, p. 96, § 1; Ga. L. 1980, p. 925, § l; Ga. L. 1982, p. 3, § 47; Ga. L. 1983, p. 1859, § 1; Ga. L. 1984, p. 1296, § 1; Ga. L. 1985, p. 209, § 1; Ga. L. 1986, p. 1543, § 1; Ga. L. 1987, p. 575, §§ 5, 6; Ga. L. 1988, p. 1351, § 1; Ga. L. 1988, p. 1742, § 1; Ga. L. 1989, p. 52, § 1.)

* * *

47-2-2. Involuntary separation from employment; grounds and procedures for discharge of employees.

(a) The provisions of this Code section are supplemental to, and not in lieu of, the provisions of paragraphs (20) and (21) of Code Section 47-2-1 defining "involuntary separation from employment without prejudice" and "involuntary separation from employment with prejudice."

(b) The word "employee" as defined in paragraph (2) of subsection (c) of this Code section shall include any such employee in the classified or unclassified service of the State Merit System of Personnel Administration provided for by Chapter 20 of Title 45. The provisions of that law or any rules or regulations promulgated pursuant thereto relative to the dismissal of employees from employment shall not be applicable to the discharge of an employee from employment pursuant to the provisions of this Code section. Any such employee who is otherwise subject to that law and rules or regulations promulgated pursuant thereto shall continue to be subject thereto for the purpose of any adverse personnel action other than discharge from employment or suspension pursuant to this Code section,

but for the purposes of such discharge from employment or suspension, the provisions of this Code section shall be exclusive.

(c) As used in this Code section, the term:

(1) "Duties" means duties and responsibilities assigned by an employer to an employee which are reasonably related to the lawful objectives and responsibilities of the employer and which are reasonably related to the position of employment held by the employee for which the employee is compensated.

(2) "Employee" means an employee, other than an elected public official, a public official selected by a vote of a board to serve at the pleasure of the board, or a public official appointed pursuant to law for a specific term of office, as defined in paragraph (16) of Code Section 47-2-1 who was a member of the retirement system prior to April 1, 1972, and who, if involuntarily separated from employment without prejudice, has sufficient membership service under the retirement system to qualify for a retirement allowance because of such involuntary separation from employment.

(3) "Employer" means any person or group of persons authorized by law or having authority delegated by law to discharge an employee.

(4) "Insubordination" means the refusal by an employee to carry out the employee's duties when instructed to do so by the employer or by the employee's supervisor upon the instructions or under the authority of the employer.

(5) "Irresponsible performance of duties" means the performance of any duties by an employee or the use of an employee's position of employment for any one or more of the following purposes:

(A) To make a financial gain or receive materials or services having financial value, except compensation received as an employee, under circumstances which would lead a reasonable person to believe that the financial gain or the receipt of materials or services was improperly related to the performance of duties by the employee;

(B) To purchase or authorize the purchase of materials or services from public funds when the employee knows or reasonably could be expected to know that the amount paid for such materials or services unreasonably exceeds the amount for which substantially equivalent materials or services could be purchased without excessive delay or inconvenience;

(C) To use publicly owned real or personal property or publicly supplied services for personal use when the employee knows or reasonably could be expected to know that such personal use of public property or services is unauthorized or improper; or

(D) To expend or authorize the expenditure of public funds in a manner which would lead a reasonable person to believe the employee shows a reckless disregard for the obligation to taxpayers to expend public funds in a prudent and efficient manner.

(6) "Malingering" means frequent absences from work or the failure to perform duties during working hours because of claims of illness which are unsubstantiated as determined pursuant to subsection (e) of this Code section.

(7) "Neglect of duty" means the repeated failure by an employee to carry out the employee's duties, either because of excessive unexcused absences from work or a failure to perform or the unsatisfactory performance of duties while at work or a combination thereof.

(8) "Proof of illness" means a written opinion by one or more physicians designated by the medical board provided for by Code Section 47-2-24 stating that an employee's absences from work or unsatisfactory performance of duties are reasonably related to an illness suffered by the employee and describing the nature of such illness.

(9) "Unsatisfactory performance of duties in a willful manner" means the unsatisfactory performance of duties by an employee when the past satisfactory performance of duties by the employee indicates the employee's unsatisfactory performance is willful as determined pursuant to subsection (f) of this Code section.

(d) An employee may be discharged from employment pursuant to the requirements of this Code section for insubordination, irresponsible performance of duties, malingering, neglect of duty, or unsatisfactory performance of duties in a willful manner or for any combination of such reasons. Any employee so discharged from employment shall not be entitled to and shall not receive a retirement benefit based on involuntary separation from employment without prejudice pursuant to Code Section 47-2-123.

(e) An employer shall have a reasonable basis for believing an employee is malingering when:

(1) The employee has a pattern of absences from work because of illness or unsatisfactory performance of duties because of illness or a pattern of absences from work and unsatisfactory performance of duties because of illness;

(2) The employer has requested the employee, in writing, to provide proof of illness and the employee has been given a reasonable opportunity, which shall not be less than 30 days after the date of the request made by the employer, to respond to the employer's request; and

(3) The employee has provided no or unsatisfactory proof of illness to the employer in response to the request made pursuant to paragraph (2) of this subsection.

(f) An employer shall have a reasonable basis for believing an employee is engaging in unsatisfactory performance of duties in a willful manner when:

(I) The past work history of the employee indicates the employee is capable of satisfactory performance of duties;

(2) The unsatisfactory performance of duties became increasingly apparent after the employee qualified for a retirement benefit based on involuntary separation from employment without prejudice; and

(3) The employee does not claim illness as a basis for unsatisfactory performance of duties and has offered no proof of illness to the employer.

(g) When an employer is considering the discharge from employment of an employee for any one or more reasons specified in subsection (d) of this Code section, the employer shall transmit a written notice to the employee containing the following:

(1) An explanation of the conduct or deficiencies of the employee which form the basis for the employer's considering the discharge of the employee;

(2) A statement that such conduct may result in the employee's discharge from employment on a specified date, which shall not be earlier than the tenth day following the date of the notice in the case of insubordination or irresponsible performance of duties and not earlier than the thirtieth day following the date of the notice if the basis for considering the discharge of the employee is for a reason or reasons other than insubordination or irresponsible performance of duties;

(3) A statement that the employee's discharge from employment for the reasons specified in the notice shall not constitute involuntary separation from employment without prejudice within the meaning of the applicable provisions of the Employees' Retirement System of Georgia and that if discharged, the employee shall not be entitled to receive and shall not receive a retirement benefit based on involuntary separation from employment without prejudice;

(4) A statement that the employee has a right to a hearing before the employer on a specified date, which shall be at least five days prior to the date specified for the employee's discharge from employment, and

(5) A statement that at the hearing before the employer, the employee shall be given an opportunity to offer explanations for the employee's conduct or deficiencies and to present evidence on the employee's behalf.

(h) An employee being considered for discharge from employment because of insubordination or irresponsible performance of duties may be suspended without pay, except to the extent the employee has accumulated annual leave, pending the completion of the procedures provided for in subsections (g) and (i) of this Code section. If the employer's final decision is not to discharge the employee or if the employee's discharge is not upheld by the court upon judicial review provided for in Code Section 47-2-3, the compensation denied to the employee during suspension shall be reimbursed to the employee and, if applicable, accumulated leave used during the suspension shall be reinstated.

(i) If an employee subject to the provisions of subsection (g) of this Code section fails to respond to the notice sent to the employee pursuant to said subsection or if the employer is not satisfied with the explanation made by the employee for the

conduct or deficiencies specified in said notice and is not satisfied with the evidence presented in the employee's behalf, the employee may be discharged from employment on the date specified in said notice or on such later date as shall be specified in writing by the employer to the employee. The employee shall be notified, in writing, of the final decision of the employer and such notice shall provide an explanation for the employer's decision.

(j) An employer discharging an employee pursuant to this Code section shall prepare a written report to the board of trustees on the discharge of the employee. Any notices or other written communications to the employee which relate to the employer's decision to discharge the employee shall be attached to and made a part of the employer's report to the board of trustees.

(k) It shall be the duty of any employer considering the discharge of an employee for any reason or combination of reasons specified in subsection (d) of this Code section to follow the procedures specified in this Code section as a condition precedent to the discharge of such employee. (Code 1981, § 47-2-2, enacted by Ga. L. 1984, p. 1296, § 2; Ga. L. 1985, p. 209, § 1; Ga. L. 1993, p. 86, § 1.)

* * *

47-2-3. Employee's right to judicial review following discharge from employment.

(a) As used in this Code section, the term:

(1) "Employee" means an employee subject to the provisions of Code Section 47-2-2 who is discharged from employment pursuant to that Code section and who is aggrieved by such discharge from employment.

(2) "Employer" shall have the same meaning as the definition of that word provided in paragraph (3) of subsection (c) of Code Section 47-2-2.

(b) An employee shall have the right to judicial review of the employee's discharge from employment pursuant to the provisions of Code Section 47-2-2. Proceedings for judicial review may be instituted by filing a petition within 30 days after the date the employee's discharge from employment becomes final as specified in the notice sent to the employee pursuant to subsection (i) of Code Section 47-2-2. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the employee. The petition shall state the

* * *

47-2-123. Allowance payable upon death, disability, or involuntary separation from employment; restrictions on separating from state service employee entitled to involuntary separation benefits.

(a) Upon the death or involuntary separation from employment without prejudice of any member in service, he shall be entitled to an allowance in accordance with subsection (c) of this Code section, provided that the provisions of this subsection that relate to "upon becoming involuntarily separated from employment without prejudice" shall not be applicable to any person who first becomes a member after March 31,1972.

(b) Any member in service who has at least 15 years of creditable service may be retired on a disability allowance by the board of trustees, upon written application to the board of trustees by the member or his employer and upon certification by the medical board that he is medically or physically incapable of further performance of his duties in the position he held at the time his disability originated, that incapacity is likely to be permanent, and that he should be retired; provided, however, that the medical board shall not consider any evidence of such disability which is not submitted within 12 months after the date the member submits his or her first application for a disability

retirement. The board of trustees may retire such member not less than 30 days nor more than 90 days after execution and filing of the written application.

(c) Any member who is at least 60 years of age upon disability retirement, involuntary separation from employment without prejudice, or death shall receive the equivalent of a service retirement allowance. Any such member who is under 60 years of age shall receive, as appropriate, a disability allowance, allowance in case of involuntary separation from employment without prejudice, or death allowance, which shall consist of:

(1) In the case of a member with at least 15 years of service, 75 percent of the service retirement allowance which would have been payable upon service retirement at age 60 had the member continued in service to age 60 without further change in compensation, provided that this paragraph shall not apply to a member whose employment was terminated by involuntary separation without prejudice;

(2) In the case of a member with at least 20 years of service, the service retirement allowance which would have been payable upon service retirement at age 60 had the member continued in service to age 60 without further change in compensation;

(3) In the case of a member with at least 25 years of service, 75 percent of the service retirement allowance which would have been payable upon service retirement at age 65 had he continued in service without further change in compensation; or

(4) In the case of a member with at least 30 years of service, the service retirement allowance which would have been payable upon service retirement at age 65 had he continued in service without further change in compensation.

Any provisions of this chapter to the contrary notwithstanding, in the application of the above paragraphs of this subsection relating to allowances other than for disability or death, projected retirement allowance computations shall be made on the basis of the member's highest total monthly earnable compensation, as reflected by monthly contributions made during the last 24 calendar months in which he had made contributions, except that no salary increase by adjustment in compensation in any manner in excess of 10 percent during the last 12 months of membership service shall be included in the projected computation.

(d) In the application of subsection (c) of this Code section to death allowances, computations of projected retirement allowances shall be made on the same basis as though option two had been in effect. In lieu of the amount of death allowance otherwise payable to the beneficiary under option two, the member, upon written request, may at any time elect a reduced level death allowance of equivalent actuarial value, which allowance is payable to the beneficiary during a period of years certain or to the estate of the beneficiary and during the lifetime of such named beneficiary thereafter. At the election of the member, in case of death of the beneficiary during a term of years certain, the balance of the years certain payments may be paid to the estate of the member; but if such beneficiary predeceases the member, the total amount of the member's contributions to the date of his death shall be payable to the member's estate. The method of determining the equivalent actuarial value shall be consistent with the actuarial method of determining the beneficiary's death allowance under option two.

(e) Anything in this chapter to the contrary notwithstanding, on and after March 6, 1963, a member who has not accumulated sufficient creditable service to qualify himself for an allowance in case of involuntary separation from employment without prejudice shall not be deemed eligible for such allowances until

he has accumulated sufficient membership service in a position classified under a merit system provided for by law or in a position covered under the retirement system. This subsection shall not affect the vesting of rights under Code Section 47-2-122. This subsection shall not be retroactive in any manner and shall not apply in any way to any person who was a member on or before February 13,1962.

(f) The age and service requirements for a service retirement allowance shall not apply to allowances available under this Code section.

(g) From and after January 1, 1985, no employing unit within the government of the State of Georgia, including every department, commission, board, bureau, agency, branch of government, or any other employing unit by whatever name called, which has the authority and power to appoint, employ, release, separate, or fail to reappoint public officials or employees shall release or separate from state service, or fail to reappoint to continued state service, any public official or employee who is entitled to coverage under the involuntary separation retirement benefits provisions of this Code section. A release, separation, or failure to reappoint in violation of the provisions of this subsection shall be illegal, unlawful, and void. However, such releases or separations from state service or failures to reappoint to continued state service shall not be subject to the provisions of this subsection if such releases or separations from service or failures to reappoint occur under any of the following circumstances:

(1) Separation or release from service of an official or employee pursuant to Code Section 47-2-2 or separation or release from service of an official or the failure to reappoint an official by a board when such official serves at the pleasure of the board;

(2) Separation or release from service of an official or employee for any reason which would constitute cause as defined in the rules and regulations of the State Personnel Board if such separation or release from service is not pursuant to Code Section 47-2-2;

(3) Separation or release from service of an official or employee for criminal conduct under the laws of this state, any other state, or the United States; or

(4) A "discretionary termination" which means any one of the following:

(A) Separation or release from service of an official or employee under circumstances in which an official or employee is released or separated or any official's or employee's position or job is abolished through a valid reduction-in-force plan approved by the State Merit System of Personnel Administration;

(B) Separation or release from service of any official or employee by reason of a bona fide reorganization of any employing unit, with respect to which reorganization any such separations or releases have been approved in advance by the Governor, or

(C) Separation or release from service of an official or employee, or failure of reappointment of an official or employee, .who holds a confidential position to an appointed or elected public official, or a group of appointed or elected public officials, incurred as a result of a change of administration in the office of such appointed or elected public official, or group of appointed or elected public officials.

(h)(1) Except where termination is required by a sudden and unexpected loss of federal or state funds, an employer intending the discretionary termination of an official or em-

ployee shall notify the :commissioner of personnel administration at least 60 but not more than 120 days prior to the effective date of the discretionary termination of such official or employee. If termination is required by a sudden and unexpected loss of federal or state funds, the employer shall notify the commissioner of personnel administration as soon as the employer becomes aware of the loss of funds and the termination shall be delayed until the completion of the procedures required by this subsection. Pending the completion of such procedures, the employee or official proposed for termination because of a sudden and unexpected loss of federal or state funds shall be compensated from any funds appropriated or available to the employer which may be used for such purpose. The notice shall be in writing and a copy thereof shall be forwarded to the board of trustees at the same time it is forwarded to the commissioner of personnel administration. The notice shall include the following information:

(A) The name and current annual compensation of the official or employee proposed for discretionary termination;

(B) The age, length of service, current job description, and summary of the work experience of the official or employee proposed for discretionary termination;

(C) The educational qualifications of the official or employee proposed for discretionary termination; and

(D) An explanation of the reasons for the proposed discretionary termination of the official or employee.

(2) After receipt of the notice provided for in paragraph (1) of this subsection, the commissioner of personnel administration shall schedule an interview with the official or employee proposed for discretionary termination. The interview shall be held within 15 days after receipt of the notice. Based on the interview

with the official or employee proposed for discretionary termination and the information provided by the notice received by the commissioner pursuant to paragraph (1) of this subsection, the commissioner of personnel administration shall contact appropriate state departments, boards, bureaus, and other agencies of the state government for the purpose of seeking continued employment for the official or employee proposed for discretionary termination. Any position for continued employment of the official or employee proposed for discretionary termination which is obtained by the commissioner of personnel administration shall meet the following requirements:

(A) The annual compensation for such position shall be the same or greater than the current annual compensation of the official or employee proposed for discretionary termination;

(B) The duties for such position shall be reasonably compatible with the previous work experience and educational qualifications of the official or employee proposed for discretionary termination;

(C) The position shall be one which includes the holder thereof as a member of the retirement system provided for by this chapter; and

(D) The position must be available for acceptance by the official or employee proposed for discretionary termination at least one day prior to the effective date of such termination and an offer of the position to the official or employee must be made, in writing, by not later than the day immediately preceding the effective date of the discretionary termination.

(3) Any official or employee proposed for discretionary termination who is offered a position of continued employment in conformity with the requirements of paragraph (2) of this subsection shall be deemed to have resigned from service at his

or her own choice upon the failure of such official or employee to accept the position of continued employment, and no such official or employee so resigning from service shall qualify for retirement benefits based upon involuntary separation from employment without prejudice as authorized by this Code section.

(4) If the commissioner of personnel administration fails to obtain a position of continued employment in conformity with the requirements of paragraph (2) of this subsection for an official or employee proposed for discretionary termination, then, on the effective date of the discretionary termination, the official or employee may be considered involuntarily separated from employment without prejudice for the purposes of this Code section.

(5) The commissioner of personnel administration shall notify the board of trustees in writing of the action taken by the commissioner pursuant to this subsection and of any position of continued employment which is offered to and accepted or refused by an official or employee proposed for discretionary termination.

(6) It is the intention of this subsection to provide procedures to secure the continued employment of officials and employees who may become subject to discretionary termination, and the provisions of this subsection shall not be construed to create any right to continue in a position of employment when that right does not exist independently of this subsection. (Ga. L. 1949, p. 138, § 5; Ga. L. 1951, p. 394, § 6; Ga. L. 1952, p. 175, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 349, § 5; Ga. L. 1957, p. 283, §§ 5, 6; Ga. L. 1959, p. 107, § 4; Ga. L. 1962, p. 54, § 5; Ga. L. 1962, p. 152, § 1; Ga. L. 1963, p. 42, § l; Ga. L. 1968, p. 1361, § l; Ga. L. 1970, p. 26, § 2; Ga .L. 1971, p. 685, § l; Ga. L. 1972, p. 3601, § 3; Ga .L. 1984, p. 1296, § 3; Ga. L. 1985, p. 209, § 1; Ga L. 1995, p. 333, § 1.)

The 1995 amendment, effective July 1, 1995, in subsection (b) added the proviso at the end of the first sentence.

* * *

Art. 3, § 10

SECTION X

RETIREMENT SYSTEMS

Paragraph VI. Involuntary separation; part-time service.

(a) Any public retirement or pension system provided for by law in existence prior to January I, 1985, may be changed by the General Assembly for any one or more of the following purposes:

(I) To redefine involuntary separation from employment; or

(2) To provide additional or revise existing limitations or restrictions on the right to qualify for a retirement benefit based on involuntary separation from employment.

(b) The General Assembly by law may define or redefine part-time service, including but not limited to service as a member of the General Assembly, for the purposes of any public retirement or pension system presently existing or created in the future and may limit or restrict the use of such part-time service as creditable service under any such retirement or pension system.

(c) Any law enacted by the General Assembly pursuant to subparagraph (a) or (b) of this Paragraph may affect persons who are members of public retirement or pension systems on January 1, 1985, and who became members at any time prior to that date.

(d) Any law enacted by the General Assembly pursuant to subparagraph (a) or (b) of this Paragraph shall not be subject to

any law controlling legislative procedures for the consideration of retirement or pension bills, including, but not limited to, any limitations on the sessions of the General Assembly at which retirement or pension bills may be introduced.

(e) No public retirement or pension system created on or after January 1, 1985, shall grant any person whose retirement is based on involuntary separation from employment a retirement or pension benefit more favorable than the retirement or pension benefit granted to a person whose separation from employment is voluntary.

Editor's notes. — The constitutional amendment (Ga. L 1984, p. 1726, § 1) which added this Paragraph was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

* * *

47-2-3. Employee's right to judicial review following discharge from employment.

(a) As used in this Code section, the term:

(1) "Employee" means an employee subject to the provisions of Code Section 47-2-2 who is discharged from employment pursuant to that Code section and who is aggrieved by such discharge from employment.

(2) "Employer" shall have the same meaning as the definition of that word provided in paragraph (3) of subsection (c) of Code Section 47-2-2.

(b) An employee shall have the right to judicial review of the employee's discharge from employment pursuant to the provisions of Code Section 47-2-2. Proceedings for judicial review may be instituted by filing a petition within 30 days after the date the employee's discharge from employment becomes final as specified in the notice sent to the employee pursuant to subsec-

tion (i) of Code Section 47-2-2. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the employee. The petition shall state the nature of the employee's interest and the grounds as specified in subsection (f) of this Code section upon which the employee contends that the employee's discharge from employment should be reversed or modified. The petition may be amended by leave of the court. The filing of the petition does not itself stay the enforcement of the employer's decision to discharge the employee, but the reviewing court may order a stay upon appropriate terms for good cause shown.

(c) Within 30 days after service of the petition or within further time allowed by the court, the employer shall transmit to the reviewing court the original or a certified copy of the entire record, which shall include the report prepared by the employer pursuant to subsection (j) of Code Section 47-2-2, of the proceedings under review. The court may require or permit subsequent corrections or additions to the record.

(d) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the hearing before the employer, the court may order that the additional evidence be taken before the employer upon conditions determined by the court. The employer may modify the employer's findings and decision to discharge the employee by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(e) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the employer, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(f) The court shall not substitute its judgment for that of the employer as to the weight of the evidence on questions of fact. The court may affirm the decision of the employer or remand the case for further proceedings. The court may reverse or modify the decision of the employer to discharge the employee if substantial rights of the employee have been prejudiced because the administrative findings, inferences, conclusions, or decision of the employer were:

(1) In violation of constitutional or statutory provisions;

(2) In excess of statutory authority of the employer;

(3) Affected by other error of law

(4) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(g) If the employee or the employer as aggrieved by a final judgment of the superior court under this Code section, either such party may obtain review of such final judgment pursuant to the provisions of Code Section 5-6-35. (Code 1981, § 47-2-3, enacted by Ga. L. 1984, p. 1296, § 2.)

Editor's notes. — Ga. L. 1984, p. 1296, § 2, enacted this Code section. Section 5 of the 1984 Act provided that this Act would become effective on January 1, 1985, only if a proposed amendment (see Ga. L. 1984, p. 1726) to the Constitution (Ga. Const. 1983, Art. III. Sec. X, Par. VI) authorizing the General Assembly to revise provisions of public retirement or pension systems relating to involuntary separation from employment were ratified at the 1984 general election. Such approval was given at that election.

Section 6 of Ga. L. 1984, p. 1296, not codified by the General Assembly, provided as follows: "Pursuant to the authority of the

proposed constitutional amendment described in Section 5 of this Act and being contingent for its effectiveness on January 1 1985, upon the ratification of such proposed constitutional amendment, this Act is exempt from the provisions of Chapter 20 of Title 47 of the Official Code of Georgia Annotated known as the 'Public Retirement Systems Standards Law.'"

* * *